

No. 12521

United States
Court of Appeals
for the Ninth Circuit.

PORTLAND-COLUMBIA LUMBER COMPANY,
a Corporation,

Appellant,

vs.

J. W. FEAK, Doing Business as J. W. Feak Mer-
cantile Company,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Western District of Washington,
Southern Division.

FILED

AUG 19 1950

PAUL P. O'BRIEN,
CLERK

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In the District Court of the United States for the
Western District of Washington, Southern
Division

Civil Action No. 1165

PORTLAND-COLUMBIA LUMBER COMPANY,
a Corporation,

Plaintiff,

vs.

J. W. FEAKE, d/b/a J. W. FEAKE MERCANTILE
COMPANY,

Defendants.

PRE-TRIAL ORDER

As the result of pre-trial conferences heretofore had, whereat the plaintiff was represented by Fred C. Dorsey and Justin N. Reinhardt, and the defendant by L. L. Thompson, their attorneys of record, whereupon the following issues of fact and law were framed and exhibits identified.

Admitted Facts

The following are the admitted facts:

I.

Plaintiff is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Oregon and has complied with all laws and paid all fees and licenses due to any public authority and is entitled to do business as a corpora-

tion. It is engaged in the lumber business and it buys and sells lumber and wood products and also acts as a broker and wholesaler of lumber and lumber products, and, through its affiliate, Prudential Lumber Company, engaged in the sale of lumber at retail.

II.

Between the first of November, 1946, and the first of February, 1947, the defendant shipped by direction of the plaintiff, twenty-six carloads of lumber to Prudential Lumber Company, plaintiff's affiliate in the City of New York. For each of said carloads defendant presented to the plaintiff a typewritten invoice, identified herein as Plaintiff's Exhibits A to Z, inclusive. This paragraph, however, refers only to the typewritten matter of said invoices. The longhand notations thereon were not placed there by the defendant or by his direction and nothing in this paragraph shall be considered to bind the defendant concerning the materiality or correctness of said notations. Neither shall this paragraph be considered as acknowledgment by the defendant that said invoices correctly set forth the agreement referred to in this action.

III.

Plaintiff paid defendant the amount specified in each of said invoices, subject to minor adjustments to correct errors in calculation, and the sums so paid by the plaintiff to the defendant represented the price demanded by the defendant of the plaintiff in

payment for each of said cars of lumber, and were paid by plaintiff to defendant in payment for each of said cars of lumber.

IV.

No bill, invoice, statement or demand for payment of any of the cars of lumber shipped as aforesaid by the defendant to the plaintiff was ever presented by or on behalf of the defendant to the plaintiff except the invoices identified as A to Z, inclusive.

V.

In the month of February, 1947, the plaintiff made a claim against the defendant for alleged overcharges claimed by it to have been made by defendant in connection with the delivery of said twenty-six carloads of lumber hereinbefore referred to. Defendant denied that he had made any such overcharge. After negotiations, defendant undertook to deliver certain lumber to plaintiff at forty-four dollars per thousand board feet loaded on cars. The contentions of the parties regarding the terms and effect of this undertaking are set forth in their respective contentions herein.

VI.

M. M. Rothstein is the President and a stockholder of Portland-Columbia Lumber Company and is the Vice-President and a stockholder of Prudential Lumber Company and acted for both companies in all their dealings with the defendant.

VII.

At no time did the plaintiff ever give to the defendant any notice previous to the inspection thereof of the time or place when it would cause said twenty-six carloads of lumber or any portion thereof to be inspected after arrival at the place or places to which such carloads were shipped.

Plaintiff's Contentions

I.

The defendant, acting through James Arthur Powers, his representative, in October, 1946, agreed to sell and deliver to the plaintiff finished Douglas Fir lumber at a price equal to the OPA scheduled ceiling price for rough lumber of the grades and quantities shipped by defendant to plaintiff, plus five per cent of that sum, plus the sum actually paid by the defendant for remanufacture of said lumber, plus five dollars per thousand board feet.

II.

The first few invoices submitted by defendant to plaintiff were not in accordance with this agreement. Therefore, plaintiff insisted that the lumber be price-tallied after remanufacture and that the invoices be based upon such a price-tally. Defendant agreed to this, but stated the price-tally could not be made by an official inspector since there was none available.

III.

The lumber delivered to the plaintiff by the defendant did not conform to the grades, quantities and species listed in the invoices identified herein as A to Z, inclusive, but instead contained lumber which, at the prices agreed upon by the parties, as aforesaid, should have been billed at \$4277.79 less than defendant demanded and plaintiff paid. In addition because of substitutions of hemlock, plaintiff suffered a loss of \$558.60.

IV.

The specific complaints presented by plaintiff against defendant and referred to in paragraph V of agreed facts herein were that the lumber contained in each of the twenty-six cars delivered by the defendant to the plaintiff did not correspond in quantity, grade or species with the invoice, and plaintiff told defendant that each of said twenty-six cars was intact and plaintiff proposed to defendant that if defendant had any doubts about these complaints, they should agree to have the lumber inspected by an official inspector. Defendant proposed that instead of going to the expense of an official inspection, he would undertake to deliver to the plaintiff twenty cars of lumber at prices sufficiently below the current market to compensate plaintiff in part for the alleged overcharges. The price fixed was forty-four dollars per thousand board feet loaded on cars. Plaintiff specified that the lumber should be either one inch or two inches

thick and that the cars should be loaded uniformly to that all lumber in each car would be of the same thickness and that all twenty cars should be delivered in not less than thirty days from March 4, 1947. Defendant, through his representative, James Arthur Powers, stated that he might not be able to deliver all twenty cars within thirty days and that deliveries would be faster if plaintiff would take some three-inch and four-inch lumber. On that representation, plaintiff agreed that some three-inch and four-inch lumber might be sent along with the one-inch and two-inch lumber. Plaintiff retained control over the quantity of three-inch and four-inch lumber by providing that the one-inch and two-inch lumber was to be shipped to the Carlson Mill in Vancouver, Washington, and that shipping instructions for three-inch and four-inch cars would be furnished by Mr. Rothstein. The negotiations of the parties are reflected generally in Exhibits A, B, C and D, attached to the Amended Complaint. Defendant did not deliver or tender to plaintiff any one-inch or two-inch lumber after March 4, 1947, but did deliver two cars of four-inch lumber and did ask shipping instructions for additional cars of four-inch lumber, which the plaintiff refused to furnish on the ground that it was not in accordance with the defendant's undertaking.

V.

Plaintiff was not obliged to accept any lumber under the arrangement described in paragraph V of agreed facts herein.

VI.

The defendant is not entitled to affirmative relief against the plaintiff on his cross-complaint.

Defendant's Contentions

Defendant's contentions are as follows:

I.

The plaintiff, acting through James Arthur Powers, its representative in the month of October, 1946, approached the defendant and sought to purchase from the defendant certain rough, green fir lumber. After certain negotiations, the parties entered into an agreement under which the defendant agreed to procure for the plaintiff as its representative such rough, green lumber as the plaintiff would require for a considerable period of time, estimated to amount to approximately five carloads per week. The agreement, in substance, was as follows:

It was agreed that the defendant was to procure rough, green unfinished lumber of various sizes from a number of sawmills in the area in which the defendant resided, principally in Pierce and Lewis Counties in the State of Washington. This lumber was to be purchased by defendant from various small mills cutting this type of lumber on the basis of the grade furnished by the supply mills and on the basis of inspections made by such mills. It was further agreed that the defendant would pay for such green lumber the price fixed for such sales by

the then existing O. P. A. regulations, and in submitting his final statement would bill the plaintiff in the same amounts which he paid to the supply mills, but that he would receive a finders fee of five per cent of the selling price of said lumber by such supply mills as compensation for his expenses, time and services in locating said lumber and arranging for its purchase. It was further agreed that defendant would arrange for the remanufacture of such lumber into finished lumber at such remanufacturing plants as were available, would advance the cost of such remanufacture, and would also supervise the shipment of the finished product after remanufacture, as directed by the plaintiff. For this additional service and for financing the transaction, it was agreed that defendant was to receive a further fee of five dollars per thousand feet so furnished.

Defendant complied with his agreement in all respects and caused to be shipped to plaintiff approximately thirty carloads of lumber, which included the twenty-six carloads particularly described in plaintiff's Exhibits A to Z, inclusive. The first five invoices submitted by defendant to plaintiff set forth the transaction in accordance with the true agreement and intent of the parties, i.e. such invoices showed the mill grades of such rough, green lumber furnished by the supply mills from which they were procured by defendant and the sums of money which had been paid by the defendant to the supply mills, and in addition thereto the finders fee and additional five dollars per thousand commission

hereinbefore referred to. Thereafter, the plaintiff requested the defendant to change the form of invoices by showing to the best of its ability the grades and amounts of lumber after remanufacture, stating to the defendant that this would facilitate the sale of such lumber on the retail market in the east. Defendant changed the form of invoices which he had heretofore used, to facilitate plaintiff's business. In other words, he attempted to give a breakdown tally of what the lumber purchased was remanufactured into provided no change of grade and no footage loss in remanufacture. This was a theoretical calculation, however, made to facilitate the business of the plaintiff and was not intended or understood to in any way change the original agreement of the parties.

II.

The plaintiff made no complaint to the defendant concerning the quality, grade or species of the lumber delivered until all of said twenty-six carloads had been paid for and had been received some place in the City of New York. The last of said carloads arrived in New York in the latter part of January, 1947, the exact date being unknown to defendant. About this time, one M. M. Rothstein, the president of the plaintiff, cancelled all further deliveries of lumber by defendant. At this time defendant had purchased and caused to be remilled and loaded on cars for the use of plaintiff an additional five carloads of lumber. A conference was thereupon had between defendant and Rothstein, at which time plaintiff asserted a claim against the defendant for

three thousand dollars for alleged damages sustained by him in connection with the delivery of the twenty-six carloads previously referred to. At the same time, defendant asserted that he had been damaged by reason of the refusal of plaintiff to accept the additional five carloads.

III.

After some negotiations, a compromise agreement was entered into, which is generally set forth in Exhibits A, B, C and D attached to the amended complaint. In effect, the agreement was that the defendant would sell to the plaintiff twenty carloads of rough, green fir or pine lumber of random length and width, of uniform thickness of either one, two, three or four inches so long as each car consisted entirely of one thickness only. The agreed price was to be forty-four dollars per thousand f. o. b. on cars, and it was further agreed that the number one and number two lumber should be shipped to Carlson Planing Mill at Vancouver, Washington, and the number three and number four to be shipped as directed by the plaintiff. It was further agreed that defendant would proceed as rapidly as reasonably possible to make said shipments but no definite time was agreed upon. In order to fulfill this order, the defendant made cutting arrangements with certain mills in the vicinity of Rochester, Washington, and in some instances financed mill charges. He shipped two carloads of number four lumber and had two or more carloads of number one and number two lumber ready for

shipment besides a carload of number four. He communicated with the plaintiff to secure shipping instructions concerning the shipment of this carload and was then advised by a representative of the plaintiff that plaintiff would not accept delivery of said car or any other carloads of lumber.

IV.

In an effort to minimize his loss, defendant resold the lumber which he had previously purchased to complete said order at a price substantially less than the one provided in the compromise agreement. In order to make this resale he had to cause this lumber to be rehandled and hauled to a remilling plant to suit the convenience of the buyer, and in connection therewith was compelled to expend the sum of \$1,701 for such rehandling and transportation. In addition to this item defendant was also compelled to sell such lumber for a sum which was \$4,171.18 less than he would have received had plaintiff accepted delivery of the remaining 18 carloads covered by the compromise agreement. The agreement hereinbefore referred to was understood and agreed to be in compromise and settlement of any claims which either of the parties might have against the other, including plaintiff's claim for damages by reason of alleged overcharges with respect to the twenty-six cars.

V.

Defendant contends that both of the alleged causes of action set forth in plaintiff's complaint should be dismissed and that he should have and recover judg-

ment against the plaintiff upon his cross-complaint in the sum of \$1,701.00, extra transportation costs, and the sum of \$4,171.18 lost profits, or a total of \$5,872.18.

Issues of Fact

The following are the issues of fact to be determined by the jury:

1. Did the lumber sold by defendant to plaintiff and covered by invoices identified as A to Z inclusive herein conform to the invoice description in respect to quantity, grade and species?

2. Did the invoices identified as A to Z inclusive herein conform to the agreement of the parties regarding price?

3. Did the agreement of the parties regarding price refer to the O. P. A. ceiling for lumber as graded before remilling or after remilling?

4. What was the difference, if any, between the invoice price and the agreed contract price for the lumber sold by the defendant to plaintiff under invoices identified as A to Z inclusive herein?

5. Was there any agreement between the parties that no claim for damages based upon inspections made in New York could be made without previous notice to the defendant of the time and place of such inspections?

6. Did the defendant's conduct in March, 1947, conform to his undertaking, if any, with respect to

the twenty (20) additional cars of lumber. If it did not, did the plaintiff suffer any damage thereby, and if so, how much?

7. Did the plaintiff's conduct in March, 1947, conform to his undertaking, if any, with respect to the twenty (20) additional cars of lumber. If not, did the defendant suffer any damage thereby, and if so, how much?

Issues of Law

1. If there was an agreement such as is mentioned in Issue of Fact No. 5 herein,

a. Was it abrogated by the negotiations of the parties in February and March of 1947?

b. Is defendant estopped from relying on the agreement as a defense against plaintiff's claim?

2. If there was an agreement such as is mentioned in Issue of Fact No. 5 and plaintiff had no inspection other than the original tallying of the lumber when it was received in New York, which was done without prior notice to the defendant, does the agreement prevent plaintiff from recovering on his first cause of action?

3. Did the negotiations of the parties in February and March of 1947 result in an executory accord or a novation?

4. Does plaintiff's refusal to give defendant shipping instructions in March, 1947, after delivery to him of the two cars of 4" lumber by the defend-

ant, prevent plaintiff from recovering on his first cause of action herein:

a. If the plaintiff's refusal to give such instructions was justified,

b. If plaintiff's refusal to give such instructions was not justified.

5. Does plaintiff's failure to give such instructions give rise to a cause of action in favor of defendant against plaintiff.

Interrogatories and Demands of the Parties

The deposition of defendant was taken by the plaintiff pursuant to notice on February 17, 1949. Thereafter, the attorney for plaintiff served on attorney for defendant a demand dated May 7, 1949, for the production of certain documents, a copy of which demand is attached hereto. Under date of September 9, 1949, plaintiff's attorney served upon defendant's attorney certain interrogatories, requests for admissions and demand for the production of documents, a copy of which is attached hereto, together with the defendant's answers.

On September 26, 1949, the defendant took plaintiff's deposition and thereafter under date of September 28, 1949, defendant's attorney served upon plaintiff's attorney certain interrogatories, a copy of which is attached hereto.

It is stipulated and agreed that each of the parties has answered the interrogatories and requests for admissions of the adverse party, and that all the

documents produced by either party in response to said demands for the production of documents are included in the documents identified as exhibits in the following section hereof, and that no document was produced by either party and no document will be produced at the trial by either party which is not included in the exhibits identified in the following section hereof. It is further agreed that neither party will seek to preclude the other by reason of any failure to produce documents or to reply to interrogatories or demands more fully or more formally than was done.

Exhibits

The following exhibits were produced and marked and may be received in evidence if otherwise admissible, without further authentication, except as hereinafter set forth, it being admitted that each is what it purports to be:

Plaintiff's Exhibits

1. Exhibits A to Z inclusive consisting of 26 invoices hereinbefore referred to.
2. The letters marked A, B, C and D, attached to the amended complaint herein.
3. Exhibits 1, 2 and 3, identified in the deposition of James Arthur Powers, taken September 26, 1949.
4. Exhibits marked A to Z, inclusive, identified in the deposition of Theodore Kimmlingen, taken

October 6, 1949. Defendant contends that these exhibits were not properly identified and therefore does not admit their authentication.

5. A summary tabulation showing the information contained in item 1 hereof and item 4 hereof.

6. Crow's Digest showing O. P. A. ceiling prices in effect at the times material to this litigation.

7. Letter from Prudential Lumber Corporation, to Mr. Milton Rothstein, Portland Columbia Lumber Company, dated January 23, 1947.

8. Letter from Prudential Lumber Corporation to Mr. Milton Rothstein, Portland Columbia Lumber Company, dated February 20, 1947.

Defendant's Exhibits

1. Bills from the remilling plants accompanied by sight drafts covering the remilling of the lumber invoiced by the defendant to the plaintiff under Exhibits A to Z of item 1 of Plaintiff's Exhibits *supra*.

2. Bill of lading covering car No. 701608 Milw. together with notice from the Bank of California to defendant of receipt of sight draft on Portland Columbia Lumber Company for collection.

Draft drawn by J. W. Feak on Portland Columbia Lumber Company in the amount of \$1440.36 with bill of lading attached.

Copy of remilling bill with pencil figures on the bottom.

3. Bill of lading for Car No. 145209 ATSF, sight draft drawn by defendant on plaintiff.

Notice of collection of said draft from the Bank of California to defendant.

Copy of defendant's invoice to plaintiff.

Bill from Hammersmith Lumber Company to defendant for remilling the lumber loaded in this car.

Two sheets of pencil figures alleged to show the tally of lumber as loaded on this car.

Weigh bill showing shipment by Hammersmith Lumber Company to defendant.

Bill of lading showing shipment by Hammersmith Lumber Company to the defendant.

4. Invoice 12147, defendant to plaintiff, covering car No. 192906 UP.

Sight draft drawn by defendant on plaintiff.

Sheets alleged to show tally of lumber loaded on this car.

Bill of Ducoda Planing Mill to defendant for remilling the lumber loaded on this car.

5. Bill of lading for Car No. 471354 Pa. showing defendant as shipper and consignee, with instructions to notify Carlson Planing Mill.

Defendant's invoice to plaintiff.

Sight draft drawn by defendant on plaintiff.

Notice by Bank of California to defendant of receipt of sight draft for collection.

Notice from Bank of California to defendant of collection.

6. Undated document entitled "History" bearing the signature purporting to be that of James Arthur Powers.

7. Carbon copy of document purporting to be a

letter dated February 28, 1947, addressed to J. W. Feak Mercantile Company, Roy, Washington, unsigned, but ending with the following typewritten words: "M. Milton Rothstein, For, Prudential Lumber Corporation."

8. Letter dated May 15, 1947, from Justin N. Reinhardt to the defendant.

9. Copy of letter dated June 3, 1947, from the defendant to Justin N. Reinhardt in reply to item 8.

10. Crow's Price Reporter covering the weeks of March 6, March 20, April 3, May 1, May 15, May 29, June 12 and June 29, 1947.

The foregoing pretrial order has been approved by the parties hereto, as evidenced by the signatures of their counsel hereon, and this order is hereby entered, as a result of which the pleadings pass out of the case, and this pretrial order shall not be amended except by agreement of the parties to prevent manifest injustice.

Dated at Tacoma, Washington, this 17th day of October, 1949.

/s/ JUSTIN N. REINHARDT,

One of the
Attorneys for Plaintiff.

/s/ L. L. THOMPSON,

One of the
Attorneys for Defendant.

/s/ CHARLES H. LEROY,
United States District Judge.

[Title of District Court and Cause.]

WRITTEN INTERROGATORIES PROPOUNDED BY DEFENDANT TO PLAINTIFF UNDER RULE 33.

Comes now the defendant herein, pursuant to the provisions of Rule 33 of the District Court rules of the District Courts of the United States, and submits the following written interrogatories to be answered by the plaintiff within fifteen (15) days after the delivery of these interrogatories to it in the form prescribed by such rule:

Interrogatory No. 1

Set forth the particular place in the City of New York where the carloads of lumber referred to in plaintiff's complaint were unloaded, the names of the persons, firms or corporations who unloaded the lumber from said cars and the exact dates when each car was unloaded.

Interrogatory No. 2

Set forth the time, place and by whom inspections, if any, of said lumber were made in behalf of the plaintiff, said answer to give the specific dates when each carload was so inspected and where inspected. If written inspection reports were made to the plaintiff, then attach to your answer to this interrogatory copies of any and all inspection reports so made.

Interrogatory No. 3

Set forth the sums received by you for the sale of lumber on each and every carload of lumber referred to in the plaintiff's complaint and the name of the person, firm and corporation to whom said lumber was sold and delivered.

Interrogatory No. 4

Set forth the time and place and by whom made of the first alleged complaint made by the plaintiff or by any person in its behalf to the defendant concerning the alleged overcharges claimed to have been made by the defendant and described in the plaintiff's complaint.

Interrogatory No. 5

Set forth a detailed computation of the alleged damage of \$7,560.00 claimed to have been sustained by the plaintiff under the alleged facts set forth in the second paragraph of the second alleged cause of action in the complaint.

Interrogatory No. 6

Set forth the time, place and by whom the plaintiff was advised that it was defendant's intention to deliver only four inch lumber to plaintiff as alleged in paragraph 2 of the second alleged cause of action in plaintiff's complaint.

Dated this 28th day of September, 1949.

L. L. THOMPSON,
HENDERSON, CARNAHAN &
THOMPSON,

Attorneys for Defendant.

[Title of District Court and Cause.]

ANSWER TO REQUEST FOR
ADMISSIONS UNDER RULE 36

Comes now the defendant herein and in response to the request of the plaintiff for certain admissions concerning the genuineness of certain documents, admits, denies and alleges as follows:

I.

With respect to Request No. 1, defendant admits that the typewritten portions of certain documents marked "A" to "Z" inclusive and delivered to defendant with said request are genuine and were mailed by defendant to the plaintiff. Defendant however states that he has no knowledge or information concerning the longhand notations made on said documents and states that they were not made by him or any person under his direction.

II.

With respect to Request No. 2, this defendant admits that each of said documents therein referred to covers one carload of lumber shipped by him to the plaintiff.

III.

With respect to Request No. 3, defendant admits that the carloads of lumber covered by said documents were shipped in certain railroad cars having the names and numbers set forth in said request.

IV.

With respect to Request No. 4, defendant denies that each of said carloads of lumber contained lumber of the grades and amounts set forth in said request.

V.

With respect to Request No. 5, defendant admits the truth thereof.

VI.

With respect to Request No. 7, defendant admits that, except for minor adjustments, the plaintiff paid to him the sum specified in documents Nos. A to Z inclusive.

VII.

With respect to Request No. 8, this defendant states that the method of computation therein set forth in invoices Nos. A to Z, inclusive was made at the request of plaintiff and to facilitate his business but does not admit that said computations correctly set forth the actual contract between the parties.

J. W. FEAK,

Defendant.

L. L. THOMPSON,

HENDERSON, CARNAHAN &
THOMPSON,

Attorneys for Defendant.

Duly verified.

[Title of District Court and Cause.]

ANSWER TO WRITTEN INTERROGATORIES

Comes now the defendant and in answer to the written interrogatories filed herein, states:

I.

Answering Interrogatory No. 11 this defendant has marked Exhibit A and attached hereto a statement of the items included in the cross complaint on file herein.

II.

Answering Interrogatory No. 12, this defendant states that the names of the mills therein referred to were as follows:

Hagerman Mill

Charles James Mill, both of Little Rock, Washington

Harrington Mill Co. of Olympia, Washington

George Cordell of Rochester, Washington

George Niemi Mill of Rochester, Washington

Ralph Brink of Rochester, Washington

J. W. FEAKE,
Defendant.

L. L. THOMPSON,
ENDERSON, CARNAHAN &
THOMPSON,
Attorneys for Defendant.

Duly verified.

EXHIBIT "A"

1947	Footage	Received Payment	Loss Incurred by Diversion
June 9.....	232,078	\$ 7,677.59	
June 20.....	13,849	553.96 Less 2%	
June 20.....	5,935	237.40 Less 2%	
June 30.....	3,136	125.44 Less 2%	
June 30.....	24,361	964.10 Less 2%	
July 9.....	4,256	170.24 Less 2%	
July 9.....	384	14.81 Less 2%	
July 9.....	10,752	416.92 Less 2%	
July 21.....	17,771	710.84 Less 2%	
Aug. 27.....	4,629	21.76 Less 2%	\$11,476.20
Aug. 5.....	13,920	542.88 Less 2%	7,677.59
Aug. 5.....	1,184	40.26 Less 2%	\$ 3,798.61 Less 2%=\$ 75.97
July 31.....	10,341	413.64) Less 2%	
Aug. 5.....	15,104	583.14) Less 2%	
Aug. 5.....	3,210	73.17) Less 2%	1,069.95 Less 2%= 21.40
Totals	360,910	\$12,546.15	

360,910' @ \$44.00 per M. would have brought \$15,880.04

Actually brought 12,546.15 \$3,333.89

Loss in cost of hauling 425,251' @ \$4.00 per M. 1,701.00

Bucoda Lumber:—

64,341 @ \$44.00 per M\$2,831.00

Actually brought \$32.50 per M. 2,091.08 739.92

Loss incurred\$5,872.18

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS UNDER RULE
36 AND INTERROGATORIES UNDER
RULE 33 OF THE FEDERAL RULES OF
CIVIL PROCEDURE

The plaintiff herein, Portland-Columbia Lumber Company, a corporation, requests the defendant, J. W. Feak, within 15 days after service of this request, to make the following admissions numbered 1 to 5 inclusive and 7 and 8, of the numbered paragraphs found below pursuant to Rule 36 of the Federal Rules of Civil Procedure for the purpose of this action only and subject to all pertinent objections as to admissibility which may be interposed at the trial and to answer the following interrogatories numbered 6 and 9 to 13 inclusive of the numbered paragraphs found below pursuant to Rule 33 of the Federal Rules of Civil Procedure.

(1) That each of the following documents exhibited with this request is genuine:

Invoice No.	Dated	Quantity	Invoice Price
A.	Nov. 6, 46	25,382'	\$1,467.92
B.	Nov. 6, 46	26,939'	1,561.53
C.	Nov. 14, 46	31,204'	1,782.69
D.	Nov. 14, 46	30,269'	1,738.53
E.	Nov. 15, 46	25,442'	1,440.36
F.	Dec. 3, 46	40,406'	2,474.26
G.	Dec. 3, 46	30,310'	1,778.97
H.	Dec. 4, 46	28,867'	1,679.11
I.	Jan. 6, 46	24,713'	1,471.32
J.	Jan. 6, 46	24,525'	1,415.68

K.	Jan. 8, 46	24,606'	1,457.95
L.	Jan. 10, 46	33,128'	1,900.79
M.	Jan. 10, 46	27,488'	1,602.62
N.	Jan. 10, 46	23,303'	1,399.01
O.	Jan. 10, 46	24,933'	1,657.03
P.	Jan. 13, 46	23,911'	1,415.55
Q.	Jan. 15, 46	30,407'	1,803.40
R.	Jan. 20, 47	32,408'	1,920.97
S.	Jan. 20, 47	25,780'	1,599.57
T.	Jan. 21, 47	31,467'	1,821.24
U.	Jan. 21, 47	32,593'	2,040.57
V.	Jan. 22, 47	23,084'	1,372.05
W.	Jan. 22, 47	31,337'	1,890.55
X.	Jan. 23, 47	26,739'	1,650.96
Y.	Jan. 23, 47	23,780'	1,470.44
Z.	Jan. 24, 47	20,529'	1,226.33

(2) That each of the twenty-six invoices numbered "A" to "Z" above covers one carload of lumber shipped by the defendant to the plaintiff.

(3) That the carloads of lumber covered by each of said invoices respectively are as follows:

Invoice No.	Car No.	Railroad
A.	146780	New York Central
B.	102133	New York Central
C.	129283	Atchison, Topeka & Santa Fe
D.	38195	SSW
E.	701608	Chicago, Milwaukee & St. Paul
F.	176340	Soo
G.	265228	Pennsylvania
H.	21233	Central Railway of New Jersey
I.	140208	Chicago, Rock Island & Pacific
J.	146401	New York Central
K.	18999	Chicago, Milwaukee & St. Paul
L.	124110	New York Central
M.	15032	L & A
N.	61552	Chicago-Northwestern
O.	6573	International Great Northern
P.	117295	Atchison, Topeka & Santa Fe

Invoice No.	Car No.	Railroad
Q.	31960	Chicago, Burlington & Quincy
R.	32365	Chicago, Burlington & Quincy
S.	145209	Atchison, Topeka & Santa Fe
T.	26534	Northern Pacific
U.	192906	Union Pacific
V.	49828	Chicago-Northwestern
W.	48978	Great Northern
X.	84124	Pennsylvania
Y.	15395	NKP
Z.	174627	B & O

(4) Each of said carloads of lumber represented by designated invoice number, contained lumber of the following grades and amounts:

Inv. No.	Grades and Amounts						
	Select Struc- tural	Select Mer- chantable	No. 1	No. 2	No. 3	No. 4	Hem- lock
A.	167	1367	7495	5158	6264	1115	3584
B.	1403	2779	8646	3622	5349	1264	3538
C.	....	620	9877	6311	6773	1897	4148
D.	....	1182	8820	7105	7045	1574	4700
E.	1569	2051	6988	4937	3975	2126	3675
F.	1649	2413	13515	4746	8889	1405	7522
G.	698	1183	9134	5371	8163	576	5223
H.	376	671	8329	7120	5588	698	4087
I.	....	1010	6803	4732	7025	961	4120
J.	24	1410	7490	5399	7077	875	2048
K.	514	1029	8335	4216	5369	1225	3829
L.	976	1246	11151	5962	8826	2391	3137
M.	55	302	6879	7677	6246	1155	5204
N.	47	1218	6233	5302	6663	1337	3084
O.	85	1118	6790	5941	5942	1070	3754
P.	278	963	8768	3725	6639	887	4083
Q.	61	2109	8653	7001	7674	825	4253
R.	....	677	9221	9634	7970	1759	2512
S.	437	625	6127	5564	4605	917	2566

T.	62	910	9199	9827	6185	1318	3896
U.	....	536	4751	6494	9812	2880	8526
V.	555	856	5974	4909	6020	1528	3215
W.	....	1088	9273	7564	6181	1944	2758
X.	534	588	10722	7406	5267	481	1741
Y.	....	520	5538	5261	7247	2393	4461
Z.	183	1446	5827	4319	5684	484	2303

(5) No bill, invoice, statement or demand for payment of any of the cars of lumber shipped from "A" to "Z" as aforesaid by the defendant to the plaintiff was ever presented by or on behalf of the defendant to the plaintiff except the invoices identified as "A" to "Z" inclusive.

(6) If your answer to the preceding question is "no," you are required to produce and identify each invoice, bill, statement or demand, other than the invoices designated "A" to "Z" inclusive above mentioned, sent by you or on your behalf to the plaintiff in connection with any or all of the 26 cars of lumber shipped by you and specifically identified in item No. 3 above.

(7) That except for minor adjustments, the plaintiff paid to the defendant each of the sums specified in invoices identified as "A" to "Z," supra, and that the sums so paid by the plaintiff to the defendant represented the price demanded by the defendant of the plaintiff in payment for each of said cars of lumber and were paid by plaintiff to defendant in payment for each of said cars of lumber.

(8) That the amount demanded of the plaintiff

by the defendant in payment for each of said carloads of lumber shipped by the defendant to the plaintiff and paid by the plaintiff to the defendant was computed in the manner specified in said invoices identified as "A" to "Z" supra.

(9) If your answer to the preceding question is "no" state the method used in arriving at the price to be paid by the plaintiff to the defendant for each of said carloads of lumber shipped by the defendant to the plaintiff, as aforesaid, and produce your original books and records, together with all supporting documents showing your computation of the price of each of said carloads of lumber.

(10) You are required to produce all correspondence, records, or other writings or papers in your possession or under your control relating to:

(a) your original agreement with the plaintiff,

(b) plaintiff's claim of over-charge presented in or about February, 1947, and the disposition of said claim.

(11) State in detail the items included in the figure \$1,701 set forth in paragraph II on page 7 of your Answer and Counter-Claim and the figure of \$4,171.18 set forth in paragraph III on page 7 of your Answer and Counter-Claim, and produce your original books and records, together with supporting invoices or vouchers or other documents for each of said items.

(12) State in detail the names of the mills referred to, the arrangements alleged to have been made, and produce your original books, records, writings and papers relating to said arrangements referred to in paragraph III on page 5 of your Answer and Counter-Claim.

(13) In your deposition of February 17, 1949, in response to the following question "Now, will you describe the manner in which you arrived at the invoice prices?" you answered as follows: "I took the grades as I found them from the mill and I took the OPA schedule, or at least my clerk did, and he computed the price of lumber according to the prices established to rough grades as purchased. I didn't receive from the mill their prices, but I did receive their grades and their quantities, and their plant list, and I took their plant list, and I set the price in accordance with OPA schedule."

You are required to produce each and all of the "plant lists" therein referred to.

If some of the matters which you are asked to admit are correct in part and incorrect in part you will please frame your answers and state what parts are correct and what parts are incorrect.

Dated at Tacoma, Washington, this day of September, 1949.

JUSTIN N. REINHARDT,

FRED C. DORSEY,

Attorneys for Plaintiff.

O'BRIEN, DORSEY & RUFF

Attorneys and Counselors at Law

Puget Sound Bank Building

Tacoma 2, Washington

May 7, 1949

Henderson, Carnahan & Thompson

Attorneys at Law

1410 Puget Sound Bank Bldg.,

Tacoma, Washington.

Attn. Mr. Thompson.

Re: Portland-Columbia Lumber Co. vs. Feak.

Gentlemen:

I received a letter from my co-counsel at Portland, Justin N. Reinhardt, in connection with the above case and we are of the opinion that we desire to submit to you in a preliminary way, the question as to whether or not you are willing to stipulate at this time:

(1) That the invoices which I have in my possession and which you may see, being 26 in number were sent by the defendant to the plaintiff at the time that the 26 carloads of lumber were shipped to the plaintiff.

(2) That each of the 26 invoices cover one car of lumber shipped by the defendant to the plaintiff.

(3) That no other invoices were sent to the

plaintiff except the invoices being 26 in number, or if it is the contention of the defendant that he sent other invoices, for him to produce the same and have them also marked as exhibits.

(4) On page 61 of the deposition, lines 3 and 4, your Mr. Thompson stated "That was done at the request of Rothstein and it was not a real billing * * *." Will you have the defendant produce the real billing so that it may be marked as an exhibit.

(5) Can the defendant get up a detailed statement of the "computation" referred to by your Mr. Thompson on line 23 of page 60 and have the defendant produce the supporting documents for the purpose of having the same marked as exhibits including the documents referred to by Mr. Feak on lines 18 to 21 of page 14 of the deposition.

It is my thought that if we can stipulate with reference to the above matters it will go a long way toward working out a proposed pretrial order in the event the court feels that a pre-trial is necessary.

Yours very truly,

O'BRIEN, DORSEY & RUFF,

By /s/ FRED C. DORSEY.

O'BRIEN, DORSEY & RUFF
Attorneys and Counselors at Law

Puget Sound Bank Building
Tacoma 2, Washington

May 7, 1949

Henderson, Carnahan & Thompson
Attorneys at Law,
1410 Puget Sound Bank Bldg.,
Tacoma, Washington.

Attn: Mr. Thompson.

Re: Portland-Columbia Lumber Co. vs. Feak.

Gentlemen:

By reason of pressing matters that seem to have delayed me I am very late in requesting certain information which it was agreed upon at the time of the taking of Mr. Feak's deposition, would be provided.

Mr. Reinhardt must be becoming very critical of me by reason of the delay as it is now some time since he suggested that I write you.

This letter is being addressed to you so that in keeping with the understanding had at the time of the taking of the deposition and the matters concerning which we desire information are as follows:

(1) Will you please provide us with copies of all writings or correspondence now in Mr. Feak's possession, with reference to his original deal with Mr. Rothstein. These matters are referred to in lines 21 to 25, page 18, and line 1 on page 19, of Mr. Feak's deposition.

(2) Copies of all correspondence or other writings regarding the claim of overcharge that may have passed between Mr. Feak and Mr. Rothstein about February of 1947 as referred to in lines 13 to 25 on page 21 of the Feak deposition.

(3) The names of the mills referred to in paragraph 3 of page 5 of the answer, and the date that, and the persons with whom any "arrangement" was made; some mills were referred to by Mr. Feak in lines 10 to 12 of page 25 of his deposition, and he also stated that he would produce the names of others if his record showed them, this being on lines 20 to 22 of page 25 of the deposition.

(4) Will you please advise us of the manner in which Mr. Feak arrived at the figure of \$1701 as set forth in paragraph 2, page 7, of his answer and also how he arrives at the figure of \$4171.18 in paragraph 3 on page 7, together with copies of all records supporting the computation. This is referred to on pages 54 and 55 and also 56 of his deposition.

It may be that the plaintiff will avail itself of other offers to provide information or supporting data, but this is the only request we have to make at this time.

Yours very truly,

O'BRIEN, DORSEY & RUFF,

By /s/ FRED C. DORSEY.

FCD:k

[Endorsed]: Filed October 17, 1949.

District Court of the United States, Western
District of Washington, Southern Division

No. 1165

PORTLAND COLUMBIA LUMBER CO.,
Plaintiff,

vs.

J. W. FEAKE DBA J. W. FEAKE MERCANTILE
CO.,
Defendant.

VERDICT

We, the jury empanelled in the above-entitled
cause, find for the Defendant and assess damages
in the sum of \$5872.18.

Dated this 20th day of October, 1949.

/s/ JAMES L. ABSHER,
Foreman.

[Endorsed]: Filed October 20, 1949.

In the District Court of the United States for the
Western District of Washington, Southern Di-
vision.

Civil Action, File No. 1165

PORTLAND COLUMBIA L U M B E R COM-
PANY, a Corporation,

Plaintiff,

vs.

J. W. FEAKE, d/b/a J. W. FEAKE MERCANTILE
COMPANY,

Defendant.

JUDGMENT

This cause came on for trial before the Court and Jury upon the 17th day of October, 1949, the plaintiff appearing by its counsel, Justin N. Reinhardt and Fred C. Dorsey, and the defendant appearing in person and through his counsel, L. L. Thompson; a jury was duly impaneled and sworn; evidence was then introduced by the respective parties and after argument made to the jury by counsel for such parties the Court instructed the jury and the jury retired to consider their verdict; thereafter the jury returned a general verdict in favor of the defendant and for damages in favor of the defendant and against the plaintiff on the defendant's cross-complaint in the sum of \$5,872.18, which verdict was presented to the Court and duly received.

Now, Therefore, pursuant to said verdict, it is considered Ordered, Adjudged and Decreed as follows:

1. That plaintiff's action against the defendant be and the same is hereby dismissed with prejudice.

2. That the defendant J. W. Feak do have and recover judgment against the plaintiff, Portland Columbia Lumber Company, a corporation, in the sum of \$5,872.18 together with his costs and disbursements herein, to be taxed by the Clerk of this court. To which plaintiff excepts and exceptions allowed.

Done in Open Court this 31st day of October, 1949.

/s/ CHARLES H. LEAVY,
District Judge.

Presented by:

/s/ L. L. THOMPSON.

[Endorsed]: Filed October 31, 1949.

[Title of District Court and Cause.]

PLAINTIFF'S MOTION FOR NEW TRIAL

Now comes Portland-Columbia Lumber Company, plaintiff in the above-entitled cause, and moves this Court for an order setting aside the verdict and judgment herein and granting a new trial of the above-entitled cause for the following reasons, viz.:

I.

That the verdict is demonstrably contrary to the Court's instructions.

II.

That the verdict is contrary to the undisputed evidence.

III.

That the damages awarded are grossly excessive.

IV.

That the verdict is so excessive that it discloses prejudice or passion on the part of the jury.

This motion will be based upon the affidavit of M. Milton Rothstein, president of the plaintiff corporation, and upon all the evidence, files and records in said action.

In accordance with the provisions of Rule 62 of the Federal Rules of Civil Procedure, the above-named plaintiff, Portland-Columbia Lumber Company, further moves this Court for an order staying the execution of or any proceedings to enforce the judgment herein pending the disposition of the within motion for a new trial.

Dated: October 27, 1949.

/s/ JUSTIN N. REINHARDT,

/s/ FRED C. DORSEY,

Attorneys for Plaintiff.

Copy received.

[Endorsed]: Filed October 27, 1949.

[Title of District Court and Cause.]

TRANSCRIPT OF COURT'S
ORAL DECISION

Transcript of Court's Oral Decision in hearing on Plaintiff's Motion for New Trial in the above-named and numbered cause before the Honorable Charles H. Leavy, United States District Judge, on the 21st day of November, 1949, at Tacoma, Washington.

Appearances:

FRED DORSEY, ESQ.,
Tacoma, Washington,

JUSTIN W. RENHARDT, ESQ.,
Portland, Oregon,
Appeared for Plaintiff.

L. L. THOMPSON, ESQ.,
Tacoma, Washington,
Appeared for Defendant.

Proceedings

(Arguments having been made in support of and in opposition to motion, the following proceedings were had, to wit:)

The Court: The motion for a new trial, Mr. Reinhardt, will have to be denied.

In doing so, I think perhaps I should briefly, at least, state my reasons for denial of it.

The issues of fact in this case were submitted to a jury for disposition and their findings on the facts are binding upon all the parties, unless they be of

such a nature that the Court could clearly say that a gross injustice has followed. But I am unable to make such a determination in this case.

You rely largely upon Crow's Digest of Prices. It was admitted as an evidentiary matter and not as conclusive in regard to the material contained therein. It always remained a question of fact for the jury to determine whether they were going to accept the evidence contained in this Digest to the exclusion of all other evidence in the case, just as it was in their province and duty to determine the weight and credibility they could give to the witnesses who testified.

If the matter were so simple that we could have determined—the jury could have determined—the measure of [2*] damages purely upon the material contained in Crow's Digest, there would have been but a single issue to submit to the jury and that was whether the Plaintiff was guilty of a breach and the measure of damages would have been taken out of the hands of the jury, and that would have been plain error to have done so.

You further argue that there is no evidence in this record concerning the sale of the two carloads of lumber. I have no clear recollection of what the evidence was, but it is my remembrance that he did move it at the best price he could get, that that was the substance of his testimony, and if it weren't satisfactory to the Plaintiff it could have been elaborated on in cross-examination.

Whether he proved his damages to what would

* Page numbering appearing at top of page of original Reporter's Transcript.

have satisfied the Court if it were trying the case is quite a matter apart from satisfying the jury who must determine that issue.

The jury, by its verdict, found that the Plaintiff was not entitled to recover on its alleged breach of contract and they found that there was no breach on the first contract, and then they found that there was a breach on the second contract and that damages followed from that breach.

Now, as to just what evidence they gave weight [3] and consideration to in arriving at the measure of damages is something that none of us can say at this time.

There certainly was no direct evidence in this case that you could say the jury had to accept to the exclusion of other evidence that the Defendant, in the resale of this eighteen or twenty carloads of lumber, deliberately went out and sold it at a price substantially under the market price, or what he could have gotten for it then, so that we might now be able to take the position that he largely was responsible for the damages that he claimed. There is nothing in this record to support that position unless we accept Crow's Digest as complete and conclusive evidence and it never could be so accepted, either by court or jury, in a case of this kind because there are, literally, scores of factors involved in a transaction such as this was: The location of the material, and the type and character, and the quantity of the material, and the mental makeup of the individual who was placed in this position at the time he manufactured the lumber and had it on his hands and

was compelled, either for financial reasons or what, to go out and seek new buyers and make sales. It may be that a more capable and prudent lumber dealer would have sold at a better price and it may be, too, that a less capable one would have sold at a lesser price.

Still, there would be no bad faith shown and [4] there wasn't in this case that I can see and I shall have to deny the motion and allow you an exception.

Is there a judgment in this case?

Mr. Thompson: Yes.

The Court: And grant you not only such time as is allowed to file your motion—or notice of appeal—but, if necessary, time to get out a record. I will be extremely liberal in conceding that you should have additional time if there is any showing as to that.

Mr. Reinhardt: Thank you, your Honor. Will it be understood that there will be no execution pending the filing of the notice to appeal?

Mr. Thompson: Well, it is embarrassing to say, Yes. Your client is in good financial standing.

The Court: Of course, if you appeal you would have to put up a bond.

Mr. Thompson: Oh, I would let it run for a couple of weeks.

Mr. Reinhardt: Thank you.

The Court: Then you may prepare and submit an order denying the motion for a new trial and allow an exception.

(Whereupon, hearing in the above-named and numbered cause was completed.)

[Endorsed]: January 19, 1950. [5]

[Title of District Court and Cause.]

ORDER OVERRULING MOTION FOR
NEW TRIAL

Be It Remembered that this matter came on for hearing upon the motion of the plaintiff for a new trial on the 21st day of November, 1949, and the Court having considered said motion and heard the argument of counsel, and having heretofore indicated its ruling upon said motion, and having directed that written order be prepared overruling said motion for a new trial and allowing an exception to the plaintiff,

It Is Hereby Ordered that said motion for a new trial filed by the plaintiff herein be and the same is hereby denied.

To which order and ruling the plaintiff excepts and its exception is allowed.

Done in Open Court this 20th day of January, 1950.

/s/ CHARLES H. LEAVY,
United States District Judge.

Presented by:

/s/ L. L. THOMPSON,
Attorney for Defendant.

Approved as to form:

/s/ JUSTIN N. REINHARDT,

/s/ FRED C. DORSEY,

Attorneys for Plaintiff.

[Endorsed]: Filed January 20, 1950.

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND
ON APPEAL

Know All Men by These Presents that we, Portland-Columbia Lumber Company, an Oregon corporation, and Century Indemnity Company, of Hartford, Connecticut, a corporation authorized to act as sole corporate surety under the laws of the State of Connecticut, are held and firmly bound unto J. W. Feak in the sum of Six Thousand Two Hundred (\$6,200.00) Dollars, lawful money of the United States, to be paid to him and his executors, administrators, successors and assigns, to which payment well and truly to be made we bind ourselves and each of us jointly and severally and each of our successors and assigns by these presents.

Sealed with our seals and dated this 27th day of December, 1949.

Whereas, On or about the 31st day of October, 1949, at a regular term of this Court in the within proceeding, a judgment was entered in favor of the defendant, J. W. Feak, above named, and against the plaintiff, Portland-Columbia Lumber Company, above named, in the sum of Five Thousand Eight

Hundred Seventy-two and 18/100 (\$5,872.18) Dollars, and thereafter, on or about the 31st day of October, 1949, said plaintiff filed a motion for a new trial, which motion was denied on or about the 21st day of November, 1949, and the said Portland-Columbia Lumber Company having filed in the office of the Clerk of this Court a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said judgment and order,

Now, Therefore, the condition of this obligation is such that if the above-named plaintiff, Portland-Columbia Lumber Company, shall prosecute its said appeal to effect and answer all costs and damages and pay the judgment of the District Court if it fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

PORTLAND-COLUMBIA

LUMBER COMPANY,

a Corporation,

By /s/ JUSTIN N. REINHARDT,

Its Attorney.

CENTURY INDEMNITY

COMPANY, a Corporation,

[Seal] By /s/ [Indistinguishable],

Its Attorney in Fact.

The within and foregoing bond is approved, both as to sufficiency and form, and is allowed as a supersedeas on this 20th day of January, 1950.

/s/ CHARLES H. LEAVY,

Judge.

[Endorsed]: Filed January 20, 1950.

[Title of District Court and Cause.]

ORDER APPROVING BOND

Plaintiff having filed a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit to review the judgment entered herein on the 31st day of October, 1949, in favor of the defendant, J. W. Feak, as against the plaintiff, Portland-Columbia Lumber Company, for the sum of Five Thousand Eight Hundred Seventy-two and 18/100 Dollars (\$5,872.18), with costs to be taxed,

It Is Ordered that the plaintiff, Portland-Columbia Lumber Company, having filed a damage, cost and supersedeas bond of Six Thousand Two Hundred (\$6,200.00) Dollars, approved by the undersigned, execution under such judgment be and it hereby is stayed until the final determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit and the coming down of its mandate to the United States District Court for the Western District of Washington, Southern Division.

Dated: January 20th, 1950.

/s/ CHARLES H. LEAVY,
Judge.

Approved:

/s/ L. L. THOMPSON,
Attorney for Defendant.

[Endorsed]: Filed January 20, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Portland-Columbia Lumber Company, a corporation, Plaintiff-Appellant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 31st, 1949.

/s/ JUSTIN N. REINHARDT,
Attorney for Plaintiff-
Appellant.

Copy received.

[Endorsed]: Filed January 20, 1950.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON

Plaintiff, Portland-Columbia Lumber Company, a corporation, proposes on its appeal to the Circuit Court of Appeals for the Ninth Circuit to rely upon the following points as error:

1. That the verdict is demonstrably contrary to the Court's instructions.
2. That the verdict is contrary to the undisputed evidence.

3. That the damages awarded are grossly excessive.

4. That the verdict is so excessive that it discloses prejudice or passion on the part of the jury.

/s/ JUSTIN N. REINHARDT,
Attorney for Plaintiff.

Copy received.

[Endorsed]: Filed January 20, 1950.

[Title of District Court and Cause.]

PETITION FOR EXTENSION OF TIME FOR
DOCKETING RECORD ON APPEAL

Comes now the above-named plaintiff, by Fred C. Dorsey and Justin N. Reinhardt, and respectfully represents to the Court:

That both of said named counsel represented the plaintiff in the District Court of the United States, for the Western District of Washington, Southern Division, at the time of the trial of the above-entitled cause.

That after reception of verdict and entry of judgment, counsel, Justin N. Reinhardt, has undertaken to appeal the verdict and judgment to the Circuit Court of Appeals, Ninth Judicial Circuit, and that in so doing, counsel, Fred C. Dorsey, has not joined.

That counsel, Justin N. Reinhardt, resides in the

city of Portland, Oregon, and has been giving such time as possible to the perfection of said appeal.

That said Justin N. Reinhardt was required to and did submit to an emergency appendectomy which required hospitalization and has caused the said Justin N. Reinhardt to be absent from his office and by reason thereof his preparation of said appeal has been delayed.

That 40 days have not elapsed since the filing of Notice of Appeal and the said Portland-Columbia Lumber Company, as appellant herein, respectfully requests that the Court grant an extension of additional time of 50 days beyond the usual 40 days allowed for the filing of the record on appeal.

Dated at Tacoma, Washington, this 21st day of February, 1950.

/s/ FRED C. DORSEY,

/s/ JUSTIN N. REINHARDT,
Attorneys for Plaintiff.

State of Washington,
County of Pierce—ss.

Fred C. Dorsey, being first duly sworn on oath, deposes and says:

That he is one of the attorneys for the plaintiff, and makes this verification for and on its behalf for the reason that no officer of the plaintiff is present in Pierce County, Washington.

That he is familiar with the contents of the foregoing Petition for Extension of Time for Docketing

Record on Appeal, has read the same and the same are true and correct as he verily believes.

/s/ FRED C. DORSEY.

Subscribed and sworn to before me this 21st day of February, 1950.

[Seal] /s/ FRANK J. RUFF,
Notary Public in and for the State of Washington,
Residing at Tacoma.

Copy received.

[Endorsed]: February 21, 1950.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
APPEAL RECORD

This matter coming on regularly to be heard upon the petition of the plaintiff, Portland-Columbia Lumber Company, a corporation, appellant herein, for an extension of time for the filing of record on appeal, and the court having considered said petition, and being fully advised in the premises, it is by the Court

Ordered that the plaintiff herein, Portland-Columbia Lumber Company, a corporation, appellant, is hereby granted an extension of time of 50 days after the expiration of the 40 days for the docketing

of appeal and the filing of record on appeal, as provided in subsection G of Rule 73.

Done in Open Court this 21st day of February, 1950.

/s/ CHARLES H. LEAVY,
United States District Judge.

Presented by:

/s/ FRED C. DORSEY.

Receipt of copy acknowledged.

HENDERSON, CARNAHAN &
THOMPSON,
Attorneys for Defendant.

[Endorsed]: Filed February 21, 1950.

[Title of District Court and Cause.]

STIPULATION FOR TRANSMITTAL OF
PORTIONS OF ORIGINAL RECORD AND
ORIGINAL EXHIBITS

It Is Hereby Stipulated and Agreed by and between the undersigned, subject to the approval of the Court, that

I.

The record on appeal herein shall consist of the documents, testimony and exhibits enumerated in the designation of record filed herein by the plain-

tiff-appellant, together with such additions, if any, as are specified in the defendant-respondent's counter designation attached hereto, and the record so designated contains all the evidence adduced at the trial relating to the issue raised by this appeal, viz.: that the amount of the judgment entered herein is not supported by the evidence.

II.

For the purpose of this appeal, there may be transmitted to the Appellate Court the original record, including transcript, papers, exhibits, and all other matters before this Court in the within action to the extent designated by the parties in their respective designations of record on appeal filed herein or by this Stipulation, and in the event that the Court shall so order, the originals of such portions of record herein so designated shall be transmitted to the Appellate Court by the Clerk of this Court and no copies of any portions of the record so designated need be prepared, filed with this Court, or transmitted to the Appellate Court.

To the extent that this paragraph of this Stipulation may constitute an amendment to the designations of record on appeal, the same shall be deemed to be and are so amended.

III.

All exhibits transmitted to the Appellate Court pursuant to any of the foregoing may be considered

by that Court in their original form and need not be printed as part of the printed record on appeal herein.

/s/ JUSTIN N. REINHARDT,
Attorney for Plaintiff-
Appellant.

/s/ L. L. THOMPSON,
Attorney for Defendant-
Respondent.

[Endorsed]: Filed April 3, 1950.

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL OF PORTIONS
OF ORIGINAL RECORD TO COURT OF
APPEALS

This Matter coming before the Court upon a Stipulation providing interalia for transmittal to the Circuit Court for Appeals of certain portions of the original record herein, and the Court being fully advised in the premises,

It Is Hereby Ordered that those exhibits and other portions of the original record of the trial had before this Court herein which have been specified by either of the parties in their respective designations of record on appeal or in the Stipulation aforementioned be transmitted to the Appellate Court in lieu of copies of the same; and

It Is Further Ordered that the appellant need not file with this Court any copies of any of the matters so designated; and

It Is Further Ordered that no copies of the matters so designated shall be made by the Clerk of this Court or by any of the parties hereto; and

It Is Further Ordered that the Clerk of this Court, under his hand and the seal of this Court, shall transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit from the files of this Court, subject to the usual provisions for the safekeeping, transportation and return

thereof, the originals of the foregoing and of this Order.

Dated: April 3, 1950.

/s/ CHARLES H. LEAVY,
United States District Judge.

We consent to the entry of the foregoing Order:

/s/ JUSTIN N. REINHARDT,
Attorney for Plaintiff-
Appellant.

/s/ L. L. THOMPSON,
Attorney for Defendant-
Respondent.

[Endorsed]: Filed April 3, 1950.

[Title of District Court and Cause.]

PLAINTIFF-APPELLANT'S DESIGNATION
OF RECORD ON APPEAL

1. Complaint.
2. Answer.
3. Reply.
4. Pre-Trial Order.
5. Testimony of J. W. Peak and Frank D Barr.

6. All exhibits offered or received in evidence at the trial.
7. Judgment.
8. Plaintiff's Motion for a New Trial.
9. Opinion of the District Court on plaintiff's Motion for a New Trial.
10. Order Denying Plaintiff's Motion for a New Trial.
11. Notice of Appeal.
12. Supersedeas and Cost Bond on Appeal and Order approving same.
13. Plaintiff's statement of points to be relied upon.
14. Plaintiff's petition for an order extending the time for docketing record on appeal and order granting said extension.
15. Stipulation regarding record on appeal.
16. Designation of contents of record on appeal, including caption.
17. Certificate of Clerk.
18. Verdict of Jury.

/s/ JUSTIN N. REINHARDT,
Attorney for Plaintiff-Appellant.

[Endorsed]: Filed April 3, 1950.

In the District Court of the United States for the
Western District of Washington,
Southern Division

Docket No. 1165

PORTLAND, COLUMBIA LUMBER COM-
PANY, a Corporation,

Plaintiff,

vs.

J. W. FEAKE, Doing Business as J. W. FEAKE
MERCANTILE COMPANY,

Defendant.

PROCEEDINGS

* * *

JOHN W. FEAKE

the Defendant, called as a witness for and on behalf
of the Defendant, upon being first duly sworn, tes-
tified as follows:

Direct Examination

By Mr. Thompson:

* * *

Q. Previous to October, 1946, did you own any
standing timber? A. No.

Q. When did you acquire, if you did, a tract
known as [6*] the Sergeant tract?

* Page numbering appearing at top of page of original
Reporter's Transcript.

(Testimony of John W. Feak.)

A. I believe it was in the fall of 1946, but in any event it was in the year 1946—the latter half of the year.

Q. And where was that tract with reference to the town of Rochester?

A. It is about two miles from Rochester. [7]

* * *

Q. Now, what arrangements did you then make to prepare you to take care of this agreement that you say you had entered into?

A. Well, I went out to the woods mills and bought their lumber and paid for it. I had it transported to the remilling plant at Olympia Harbor Company, who remanufactured. I also had some shipped to Bucota, a remilling plant.

Q. What was the name of it?

A. Bucota Planing Mill.

Q. And Olympia Harbor?

A. Olympia Harbor, situated in Olympia and owned by the Anderson Brothers.

Q. And has operated for how many years?

A. Twenty-five (25) or thirty (30) years, I guess.

Q. Were you sufficiently informed to make any statement as to the general position of that concern in the industry and, if so, tell us?

A. At the time they were remilling for me they were one of the best mills in the industry. The operators had been in the business longer than most of the others.

Q. I wish you would give the Jury some idea of

(Testimony of John W. Feak.)

what these woods mills actually were. We call them mills. What were they? [11]

A. Well, a woods mill consisted of a head rig which was just one power saw and a carriage alongside of it on a derrick which pushed the log in and they were built to square up these smaller second growth logs. They manufactured lumber in this form. They would take a log with an eight (8) inch top and by squeezing and having a little bark on the corner they made a six by six. They only squared up those logs. They didn't cut it into lumber. They got the maximum amounts in even sizes in inches in one piece where possible. When they got into eighteen inch sizes they cut them into four or six inch cants, as large as they could, by hand. These mills had no planers or edgers or any convenient facilities for loading. They sometimes had a little shed but sometimes didn't cover the saw where the man that ran the saw worked for the operation. [12]

* * *

Q. Who logged your tract, the Sergeant tract?

A. These various mills who contracted to buy the stumpage.

Q. And did you charge—what did you charge them, more or less?

A. It was about the average prices at the time I made the agreement. It turned out to be much less. Stumpage went up. I sold at seven dollars (\$7.00)

(Testimony of John W. Feak.)

and that kind of stumpage went up to twelve dollars (\$12.00).

Q. The O. P. A. went off November 10th. Do you agree with that? A. Yes. [19]

* * *

Q Now, what, if any, financial arrangements did you have with these small woods mills that you have testified about, Mr. Feak, after you made this arrangement with Mr. Powers concerning the delivery of this lumber to Mr. Rothstein?

A. I went out and paid them for lumber in advance with the understanding that they would cut lumber for me as it was ordered.

Q. And did they begin to cut it?

A. Yes, they did.

* * *

Q. You have been in the court room during this entire trial, have you? A. Most of it.

Q. And you heard the explanation given by Mr. Rothstein concerning the differences between these two types of exhibits in this A to Z of Plaintiff's Exhibit 4? A. Yes.

Q. First I want to ask you this question with respect to all the exhibits. There is included there a finished—yes, you have gone into that.

Q. Well, when and how were you first informed

(Testimony of John W. Feak.)

that Mr. Rothstein wouldn't take any more shipments?

A. I had bought five cars of lumber for Mr. Rothstein's account. The lumber car had come down and I was then willing to have it P.L.I.B.'d by the Pacific Lumber Inspection Bureau, which I did, and I invoiced them on the basis of the P.L.I.B., because I knew that I couldn't sell them otherwise at that time and I was willing to take part of the loss to get out and so I took my papers and got my sight draft drawn and called Mr. Powers up and told him I was shipping him five cars and he said, I just got through talking to Mr. Rothstein and he would not buy any more and I said he was obligated because I hadn't been notified that he didn't want to buy any more. He told me that I better get in touch with him direct because [27] he indicated he would not accept lumber from me. So that I got immediately in my automobile and I went down to Portland and I called Mr. Powers from Vancouver and I went out to the plant and Mr. Rothstein was not in the office and I went out to the mill where he was and I found Mr. Rothstein in the mill. He came back to the office and told me—I showed him the papers and my invoices and I asked him if he wouldn't reconsider his refusal to take the lumber—that he didn't want the lumber and that it wasn't satisfactory to him and that he wasn't buying lumber from me and I told him that I bought it for his account and that if he intended that he should have advised me before I

(Testimony of John W. Feak.)

went to the expense and trouble and he said I had no written order and therefore no claim of responsibility as far as he was concerned.

I had no written order it was true so that I was influenced by the remark, that he made. I told him, however, that the terms of our understanding had been such that I should hold him for any damages that I finally received by diverting these cars to another customer for what I had the right to expect from him. He told me I would not get any place asserting a claim against him and that he would not be responsible for any loss I took and he said he was going to assert a claim against me.

Q. Did he say for how much? [28]

A. He said for three thousand dollars (\$3,000.00). When I called Mr. Powers in Vancouver he told me that Rothstein expected to assert a claim of two thousand dollars (\$2,000.00) against me, but when I talked to Mr. Rothstein—between the time Mr. Powers talked to him and I reached there about noon—he had changed his price to three thousand dollars.

Q. Now, let me ask you whether there was another meeting on the same day, or a day or so later, at the office of Mr. Powers or Mr. Reinhardt?

A. There was not. I never saw Mr. Rothstein again.

Q. Just that one time?

(Testimony of John W. Feak.)

A. That is the only time, that I have any recollection of.

Q. He testified that this was agreed on at the mill the first time you saw him.

A. That was suggested to me but it was suggested to me by Mr. Powers, I would say, at least a week after I came back to Tacoma. I left Mr. Rothstein immediately because I had cars I had to get diverted to other customers and I had to get them back to where I could do it.

Q. Did Mr. Powers call you later?

A. Mr. Powers called me later and he told me. He was trying to work out some kind of settlement and Mr. Rothstein was insisting on some kind of action and I told [29] him I would have a claim against Mr. Rothstein because I told him first I would hold him for the loss on the five cars.

Q. Well, in any event, did you finally make the agreement reflected in these letters which were attached to the Amended Complaint and which you have seen, I take it?

A. Yes; I did, finally.

Q. And what preparation did you then make to perform this new agreement?

A. I put—I got the mills to cut four inch cants first, because Mr. Rothstein was anxious to get immediate delivery. He wanted me to agree first that I would sell him fifty cars in thirty days and I wouldn't agree to sell fifty cars in thirty days be-

(Testimony of John W. Feak.)

cause I didn't think I would be able to get that time——

Q. Just a minute. What was the difference in your first series of transactions and in the second arrangements that you had with Mr. Rothstein? Don't go into details but——[30]

* * *

A. In the first arrangement I found the lumber for [31] Mr. Rothstein's account and in the second I sold it to him.

Q. That isn't it. What physically happened? Listen to me. In the first transaction you found it or got it or bought it. We don't care. The rough lumber at the mill, didn't you? A. Yes.

Q. And you arranged for its transportation to the remilling plant? A. Yes.

Q. And after it was remilled you gave shipping directions, or at least supervised to some extent the remanufacture? A. Yes.

Q. And you advanced the money for all the transactions? A. Yes.

Q. That was the first transaction and for that you received a finders fee and a commission. Now, take the second transaction. What was that compared to the one I have described probably more than you have?

(Testimony of John W. Feak.)

A. I bought the lumber from the woods mills and had it delivered to a railroad siding and loaded on cars and had it shipped to Mr. Rothstein for a flat price. [32]

Q. How did he pay you on that?

A. In the same manner, sight draft attached to bill of lading.

Q. Was there any finders fee in connection with that? A. No; a flat price.

Q. Forty-four dollars (\$44.00) a thousand?

A. Forty-four dollars a thousand.

Q. I think some of these letters written by Mr. Reinhardt say one, two, three and four inches of random widths and lengths and thickness—something like that. I am no lumberman. What does that mean, actually?

A. That meant that the lumber was to be—my arrangement was the same size, the same thickness. There was only one requirement. It was random everything except as to thickness. The lumber shipped on the cars had to be one, two, three and four inch and each shipment must contain the same thickness—the same as the former twenty-six cars.

Q. But there was no grade arrangement in the second deal?

A. No more than as formerly shipped.

Q. And the figures one, two, three and four had reference to the thickness?

A. It was mill run. [33]

(Testimony of John W. Feak.)

Q. It might get you confused with one, two three and four—better grades—but this was a mill run deal, was it? A. Yes.

Q. Now to go back to where I interrupted myself. What arrangements did you make to complete this contract?

A. I built a loading dock at the side track at Rochester. I financed thirty-five hundred dollars (\$3500.00) of machinery installation for Mr. James. I bought an edger for Mr. Hagerman to cut one and two inch lumber and put the other mills cutting three and four inch lumber to get early delivery.

Q. Now, explain the difference in the woods mills of equipment necessary to cut one and two inch lumber and three and four inch lumber, if you will.

A. It took this equipment—different equipment. A head saw could cut the slabs off the side of a log and not waste much of the log, but in manufacturing that into one and two inch lumber—those power saws in the mills are that big—they take up to one-half inch. So that, if you cut a one inch board, you lose. Whereas, if you cut the slabs off and you can get it into the mill and the saws which are very thin will enable you to get six one inch boards out of a six by six. But, if you try to get six inches of lumber out of a woods mill you waste a large part of the log. That meant that in order to get these mills to cut one and two inch lumber I had to put in the kind of machinery that wouldn't require them to handle too

(Testimony of John W. Feak.)

much log for so little lumber and put it through their head rigs in order to cut this thinner stuff. So that, what I did was to put the mills to cutting four inch cants. I had quite a struggle with Mr. Powers to get me to ship three and four inch lumber. That enabled me to make early shipments while I was getting these other mills set up, which was what they originally wanted. I went to this expense and there were loading arrangements and loading jacks and many other expenses that I went to. I made full preparations and was in full swing——

Q. Where was your loading point, by the way?

A. Rochester, Washington. Two miles from most of our mills.

Q. And who were the mills that you made arrangements with to keep this second transaction going?

A. The mill ~~that~~ was going to cut exclusively the one and two inch lumber was the Hagerman mill. I got the machinery for them to do that.

Q. And your first two car loads were what thickness?

A. The first two car loads were four inches in thickness.

Q. Now, your agreement there provided that you had [35] to have shipping instructions as to three and four, did you not? A. Yes.

Q. From Mr. Rothstein? A. Yes.

(Testimony of John W. Feak.)

Q But that in the absence of any instructions one and two were to go where?

A. Carlson Planing Mill, Vancouver.

Q. As to the first two, were you given shipping instructions by anybody?

A. Yes. Mr. Rothstein instructed—he had us send the four inch cants to the Carlson Planing Mill, which is where he had intended having the one and two inch go.

Q. And that was about what time, with reference to March 8, 1947?

A. I think the first car was shipped eleven days after March 8th. I think it was shipped March 19th. Loaded on the car and on its way March 19th.

Q. Can you approximate the time when your third car was ready for shipment?

A. I don't have that record. I could get it from the railroad company.

Q. Was it after April?

A. No; it was in the month of March, although there was great difficulty then in getting cars. [36]

Q. By this time state whether or not the plants upon which you relied to get the one and two inch cut were beginning to operate?

A. Yes. We had, we loaded two cars and had trouble getting our cars in for loading. There was a shortage of cars in the Northwest. We got a car loaded.

Q. That was on——

A. Four inch. On the loading dock and I had an-

(Testimony of John W. Feak.)

other car ready for loading. And then back of that on the ground I had between five and six cars of one and two inch as soon as I could get this other stuff out of the way.

Q. Did you ever ship the third car to Mr. Rothstein? A. I loaded it for him.

Q. It was never shipped?

A. I couldn't ship it. He refused——

Q. Why wasn't it shipped?

A. He refused to give shipping instructions and stated he wouldn't accept the car.

Q. Now you say he refused. Was that directly to you or through Powers?

A. I called Mr. Rothstein.

Q. Yes; tell us that conversation.

A. I told him I had another car and he wanted to know what thickness it was. He complained of the manner in which it was loaded, saying that the braces hadn't been [37] properly placed and it came in loaded badly and he had expected one and two inches and he wouldn't accept that car because it was four inch thickness and I told him I had one and two ready to ship, but that he had to take not only this third car but a fourth car before I could load one and two. He said he wouldn't take any one or two or three or four or anything else. The conversation ended so that I called Mr. Powers.

Q. Was there any statement by you to him as to

(Testimony of John W. Feak.)

what you intended to ship after all you had on the ground had been shipped?

A. I told him I had between five and six cars of one and two at the side track ready to load.

Q. You didn't make any statement about what would happen after that time?

A. I did later. I told them later I was ready, willing and able to perform the contract at any time.

Q. Did you ever, at any time, ever state to them that you would ship nothing but four's?

A. No; I did not. Quite the contrary.

Q. Now, at that time you say you had about how many thousand feet manufactured and ready for shipment at the shipping point?

A. I had more than one hundred thousand feet, because I had to pay the truckers on that basis to get it [38] away from there and into the milling plants.

Q. What was the—did you compute the average weight of the first two cars that you shipped?

A. I didn't compute the weight but I computed the footage.

Q. And that was how much?

A. I could refer——

Q. About how much?

A. It was about—a little over twenty-one thousand feet per car, rough lumber.

Q. And how much rough lumber ordinarily can you get on one of those cars? What is the spread of the variance?

A. It depends on the size of the car. You can get

(Testimony of John W. Feak.)

up to twenty-eight thousand feet of rough lumber on a car.

Q. Now, Mr. Feak, you say you had about one hundred thousand feet on the ground. Had you actually purchased, in order to fulfill this second contract, any rough lumber and, if so, how much?

A. I had purchased on the basis of the advances I had made the mills, I had purchased enough lumber to more than fill the order of twenty cars.

Q. And after this refusal of Mr. Rothstein to accept any further deliveries, were you compelled then to dispose of eighteen car loads of lumber which you had purchased to fill the order? [39]

A. Yes.

Q. And what, if any—strike that. What, if any, efforts did you make to dispose of this lumber which you had purchased?

A. I watched the lumber market which had gone into a decline. I tried to sell this in both Tacoma and Olympia Harbor and I tried to find other orders where I could have it remilled and disposed of and I finally sold, months later, the lumber that I had had transported to Tacoma. I had no place to leave it by the mill sites.

Q. All right. Go ahead. You sold it to whom?

A. To Bucoda and to the Olympia Harbor Lumber Company.

Q. And in order to do that did you have to make any additional expenditures for rehandling and transportation? A. Yes.

(Testimony of John W. Feak.)

Q. How much?

A. I would have to see my sheets but my recollection is around seventeen or eighteen hundred dollars for hauling.

Q. I see. And in the point of figures, from the time of this refusal, which was—you say—in the latter part of March, this refusal of Mr. Rothstein to take the third car, what was the general trend of the lumber market in that area with respect to this kind of lumber? [40]

A. Can I give the period?

Q. Yes; that is right.

A. In January——

Q. No. Don't go back.

A. The early part of March lumber had recovered and started upward. Demand and price was better. Well, I would say the demand was better which would influence prices.

Mr. Reinhardt: I would like to object to the witness testifying in general as to the lumber market——

The Court: Well, I am assuming that he is confining himself to the question as applied to the lumber here.

Mr. Thompson: Well, the market in the locality.

The Court: On this type of lumber.

Mr. Thompson: Yes; I am restricting it to that.

The Court: Yes; the witness should restrict his answer.

Q. (By Mr. Thompson): Go ahead, Mr. Feak.

(Testimony of John W. Feak.)

A. This type of lumber is not simple——

The Court: Without explaining, just state the fact whether this lumber was holding its own or dropping or climbing.

The Witness: It climbed a little the first part of March. [41]

Q. (By Mr. Thompson): And——

A. And sagged towards the end.

Q. Sagged to what extent? To a base price of forty-four dollars (\$44.00) a thousand that you had agreed upon, was it up or down from that base point? A. It was way down.

Q. Well, indicate in figures, if you can.

A. Some mills were selling that same kind of lumber at the end of March, and glad to get it, at (\$35.00) thirty-five dollars.

Q. Yes.

A. Two months later Bucoda stated they were willing to pay twenty-two (\$22.00) or twenty-eight (\$28.00) dollars, depending on grade and length, but they did better for me.

Q. And what did you finally get for it?

A. I finally got thirty-two fifty (\$32.50) for some two hundred thousand feet that I took to Bucoda.

Q. I want to ask you how you computed your alleged damage here, Mr. Feak, in addition to the transportation charges?

A. As I say, I had bought more lumber than it took to fill the twenty car order. I sold part

(Testimony of John W. Feak.)

to Olympia Harbor at a better price than I received from Bucoda. I first took [42] the average between the two cars accepted and it came to something over twenty-one thousand (21,000) feet per car. They were small cars but I thought that inasmuch as I was computing my losses I should confine my claims to the average amount that they had accepted, so they got the little the best of it on that basis. I computed my basis on 425,251 feet which they refused to accept.

Q. Which made a damage of how much?

A. The damage consists of \$1701.00 for hauling and \$3333.89 for the difference between what I received from Olympia Harbor for the part they took. And two per cent discount, I took \$21.40, and two per cent on another item, \$75.97. And that price to Mr. Rothstein was net. And at Bucota, where I hauled several hundred feet—there was sixty-four thousand left after grading. Then there was the higher priced lumber that I had sold to Olympia Harbor. I then charged them for the loss that I took on the lumber it took to make up the 425 thousand. I sold to Bucoda at \$32.50 a thousand. At \$44.00 I would have received \$2831.00 but I received \$2091.08, to make a difference of \$739.92. The total is \$5872.18.

Q. That includes the transportation items?

A. That includes the transportation items but it doesn't include the cost of building the dock or

(Testimony of John W. Feak.)

wrecking it or any of the credit loss that I sustained. [43]

The Court: I think we will suspend at this time.

Mr. Thompson: I would like to have marked as an exhibit this paper to illustrate the testimony of the witness on the same theory as the other.

The Court: Yes. It will not be an exhibit as proof of anything.

Mr. Reinhardt: May I inspect this before——

The Court: Yes. I understand it is merely a compilation of damages made up by this Defendant in the aggregate. You may look at them. We will adjourn Court until ten o'clock tomorrow morning. [44]

* * *

Mr. Thompson: At the adjournment of Court yesterday I submitted a calculation of Mr. Feak's to illustrate the damage for the same purpose as you permitted that on the other side.

The Court: Have you examined it?

Mr. Reinhardt: There is only this distinction between the two documents. The one before was based on documentary evidence and this is not.

The Court: This is based upon the testimony of the witness.

Mr. Reinhardt: On the oral testimony.

The Court: Well, it is not being admitted as evidence but merely to be submitted to the Jury so that they may better know the contentions of the parties.

(Testimony of John W. Feak.)

[See pages 124 to 126 of this printed record for unnumbered tabulations used during trial of cause.]

Now, you may proceed. [45]

* * *

Q. Is there a publication known as Crow's Digest which has a general circulation in the lumber industry? A. Yes.

Q. And state generally what that is. Don't go into any details but what is the extent of the circulation, if you will.

A. Well, it is used throughout the lumber industry as an authority respecting prices and conditions.

Q. State whether or not it has a general circulation in the Pacific Northwest.

A. Throughout the full length of the Pacific Coast, as a matter of fact.

Mr. Thompson: I believe it is stipulated, Counsel, that these Price Digests need not be authenticated?

Mr. Reinhardt: That is correct.

Mr. Thompson: We offer these Digests in evidence, if the Court please.

The Court: There is no objection, I understand?

Mr. Reinhardt: No objection.

The Court: They will be marked as a single exhibit and admitted.

The Clerk: Defendant's Exhibit Number A-4 marked for identification and admitted in evidence.

(Testimony of John W. Feak.)

(Document referred to marked Defendant's Exhibit Number A-4 for identification and admitted in evidence.) [50]

* * *

Cross-Examination

By Mr. Reinhardt:

All right. I would like to have this marked, your Honor.

The Court: Is that an exhibit in the pre-trial——

Mr. Reinhardt: Yes, your Honor.

The Clerk: Plaintiff's Exhibit 8 marked for identification.

(Document referred to marked Plaintiff's Exhibit Number 8 for identification.)

Mr. Thompson: Are you offering it?

Q. (By Mr. Reinhardt): Mr. Feak——

Mr. Thompson: Go ahead.

Mr. Rheinhardt: It is admitted that this was written?

Mr. Thompson: Yes.

Mr. Reinhardt: This was authenticated?

Mr. Thompson: Yes.

Q. (By Mr. Reinhardt): Mr. Feak, on June 3, 1947, you wrote me a letter in answer to a letter from me.

The Court: You better have it admitted.

Mr. Reinhardt: I will offer it in evidence. I am sorry.

(Testimony of John W. Feak.)

Mr. Thompson: No objection. [74]

The Court: It may be admitted.

(Document previously marked Plaintiff's Exhibit Number 8 for identification received in evidence.) [75]

* * *

Q. Now, Mr. Feak, as I recall your testimony yesterday, you said that you had telephoned Mr. Rothstein between March 20th and March 30th, 1947, to ask him for shipping instructions on your third and fourth cars of four inch lumber. This is on the twenty car deal; is that right?

A. I called him? I don't know what I said. I suppose I did if I was asked the question.

Q. That is what I want to get clear in your mind.

A. I called Mr. Rothstein on the third car, the same as the first two.

Q. And that was between the 20th and 30th of March? A. Yes.

Q. And he told you he wasn't going to take any more four-inch lumber?

A. Yes; he refused to give me shipping instructions and said he wouldn't take any more lumber.

Q. That is what I want to talk to you about. You say that in that same conversation he said that he wouldn't [76] take—strike that. You said yesterday, Mr. Feak, that in that same conversation you told Mr. Rothstein you had five cars of one and

(Testimony of John W. Feak.)

two-inch lumber stacked behind these cars of four-inch lumber; is that right?

A. Yes; I told him I had a lot of it.

Q. Ready for loading? A. Yes.

Q. And he said he wouldn't take those either?

A. Yes, as I remember he did. I am not right clear on that. It might have been Mr. Powers. I did talk to Mr. Rothstein on the third car and I am positive I told him I had another car of four-inch and he refused to take it.

Q. What happened to the one and two-inch?

A. As I recall, I told him I had a lot of one and two-inch and it might have been Mr. Powers.

Q. What I want to get at is this: Did you know on that day, whether after your conversation with Powers or Rothstein, did you know on that day that you weren't going to ship any one and two-inch lumber to Mr. Rothstein?

A. I had it ready to ship. Does that answer your question?

Q. I don't think so. Did Rothstein then indicate to you that he wouldn't take one and two-inch lumber?

A. My recollection is that he did, that either Mr. Powers or Mr. Rothstein said he wouldn't take one and two-inch [77] and I am almost positive that Mr. Rothstein would not take any more lumber and he blamed it on the way in which the second car had been loaded and not on thickness. I might have had two conversations with him.

(Testimony of John W. Feak.)

Q. If there were two conversations, this was on the same day?

A. No, sir; in connection with the same matter, the third car.

Q. Well, was it on the same day, that is what you testified?

A. I couldn't say as to that.

Q. That is what you testified to yesterday?

A. There were several conversations that day over the telephone. I spent a lot of money on phone calls. I was in a bad spot and the car was loaded and had to move some place.

Q. Very well. But you are clear that you did tell Mr. Rothstein at that time that you had these other five cars of one and two-inch?

A. My sincere belief is that I did.

Q. You did?

A. Yes, I am very confident that I did. I am quite sure that I told both Mr. Powers and Rothstein, but I know I told Mr. Powers.

Q. And that was in that first conversation about this [78] third car of four-inch lumber?

A. Well, it was in the conversation where I asked for shipping instructions on the third car.

Q. That is what I am getting at. A. Yes.

Q. Now, I would like to refer to your letter of June 3rd, Exhibit 8, in which you said to me: "The premise upon which your client refused the third car was that it was four inches thick." That doesn't conform to your present recollection, does it?

(Testimony of John W. Feak.)

A. Oh, yes, it does. That entered into it. Everything entered into it. Thickness and loading an—

Q. All right. "Your order to me included four-inch lumber." Now, listen to the rest of this: "Endeavoring to comply with his changing mind, I began the manufacture of one-inch and two-inch lumber." Now, is that true? A. That is true.

Q. You then began the manufacture of one and two-inch lumber?

A. That had reference—that had reference to a former time. I started that right off the bat.

Q. I will read this again: "Endeavoring to comply with his changing mind, I began the manufacture of one-inch and two-inch lumber." Did you?

A. I remember. I can quote it for you if you want [79] me to. I think pretty closely.

Q. "The premise upon which your client refused the third car was that it was four inches thick. Your order to me included four-inch lumber. Endeavoring to comply with his changing mind, I began the manufacture of one-inch and two-inch lumber."

A. I did begin the manufacture of it.

Q. You did? Did you begin it before or after you had this conversation with him about the third car of four-inch lumber?

A. I began it before.

Q. You did? And you think that is what this letter says?

A. I began the manufacture of it.

(Testimony of John W. Feak.)

Q. Please answer that yes or no.

A. Yes, it does.

Q. It does? Then you stand on your testimony that you did have those five cars of one and two-inch lumber stacked and ready for loading when Rothstein refused the third car of four-inch?

A. Yes; I did.

The Court: It is now time for the morning intermission, so that we will take a recess of fifteen minutes.

(Whereupon the jury retired, and at 11:00 o'clock a.m., October 19, 1949, a recess was had until 11:15 o'clock a.m., October 19, 1949, at which time, jury and counsel heretofore noted being present, the following proceedings were had, to wit:)

The Court: Now you may proceed.

Q. (By Mr. Reinhardt): Mr. Feak, did you testify when I was questioning here that you went to the O.P.A. and got their approval in connection with the price tally understanding that you were talking about?

A. I went to the O.P.A. a number of times in Seattle and I was told that handling it in this manner was within the regulations.

Q. Did you do that in connection with the price tally understanding?

A. I don't know that I discussed with them. I

(Testimony of John W. Feak.)

asked how I could charge five per cent finders fee.

Q. I don't want to go into that. Just answer the question I asked. A. Pardon me.

Q. You say you did not?

A. I don't recall that I did.

Q. I don't know whether that had been your testimony or not. Now, going back—or one other thing, Mr. Feak—I think you testified that Mr. Risch tallied this lumber as it went on to the green chain? [81] A. Yes.

Q. What is the green chain? This is in the remanufacturing mill? A. Yes.

Q. What is the green chain?

A. It is a travelling chain on which the lumber is dumped and the chain picks it up a piece at a time and carries it over a platform and drops it down where it goes through the resaw. It travels about fifteen or twenty feet in that process.

Q. Is the green chain the beginning or end of the remanufacturing process?

A. At the beginning.

Q. It is not where the finished lumber comes out?

A. No; it isn't.

Q. What do you call it then where the finished lumber comes out? A. What is that?

Q. What do you call the mechanism on which the finished lumber comes out?

A. It comes out on the same type of travelling conveyor.

(Testimony of John W. Feak.)

Q. Is that a green chain, too?

A. There is a floor——

Q. I understand that. I am just asking for the name [82] of the equipment at the finished end that corresponds to the green chain at the rough end.

A. I don't know what they call it.

Q. You don't know? All right. Now, just before the recess, Mr. Feak, you were on the question of the status of the five cars of one and two-inch lumber at the time you requested instructions from Rothstein about the third car of four-inch and your testimony was that those five cars of one and two-inch lumber were then stacked behind the cars of four-inch?

A. The one and two-inch, something over one hundred thousand feet.

Q. That was stacked there at the time you asked Rothstein for instructions of the car of four-inch?

A. Yes, sir. It wasn't there probably at the time the third car was ready but before I found that I had to transship it to someone else. I stopped it when I found out he wasn't going to take it.

Q. But there was a substantial quantity there before you found out he wouldn't take the third car?

A. Oh, yes.

Q. In your letter of June 3rd, again, which you wrote me, after I told you this law suit would be filed, you said, "Endeavoring to comply with his

(Testimony of John W. Feak.)

changing mind, I began the manufacture of one-inch and two-inch lumber [83] and when a number of carloads were at the sidetrack ready for loading, I called Mr. Powers and asked him to check with Mr. Rothstein to be sure he hadn't changed his mind again." Do you remember writing that? A. Yes.

Q. Now, isn't it true that that indicates that the first time this one and two-inch lumber wasn't stacked there?

Mr. Thompson: I object to that as argumentative.

The Court: Objection sustained.

Q. (By Mr. Reinhardt): Now, actually, Mr. Feak—actually, Mr. Feak—there wasn't any occasion for you to talk either to Mr. Powers or to Mr. Rothstein about one and two-inch lumber in connection with these twenty cars, because, if I understand you correctly, under your arrangement with him, the one and two-inch lumber was supposed to be shipped to the Carlson's mill in Vancouver; isn't that right?

A. It is true that the one and two-inch was to be shipped to the Carlson's mill, but it is not true that there was no occasion to call.

Q. But you didn't know where you could ship the three and four-inch lumber, did you?

A. I had to get shipping instructions on the three and four-inch. [84]

(Testimony of John W. Feak.)

Q. So that there was reason to talk about the three and four-inch lumber, wasn't there?

A. Yes. There was reason to talk about all of it when he refused to take any of it.

Q. And isn't it true that throughout the negotiations you had with Mr. Rothstein that resulted in this arrangement for the delivery of twenty cars, that Mr. Rothstein always stressed the fact that what he was most anxious to get was one and two-inch lumber?

A. If you admit that Mr. Powers was his agent, yes. I didn't see Mr. Rothstein in connection with this deal at all.

Q. In connection with what deal?

A. This twenty-car deal.

Q. You didn't see him in connection with that at all? A. No.

Q. I thought yesterday you testified you said you saw Mr. Rothstein out at his mill?

A. He said then definitely he would not take any more lumber from me and he didn't propose that I sell him any whatever.

Q. That was before the twenty-car deal?

A. Yes.

Q. So that there was no discussion between you and [85] Mr. Rothstein regarding this twenty-car deal? A. No.

Q. At any time?

A. Not directly with him, except through Mr. Powers and you.

(Testimony of John W. Feak.)

Mr. Thompson: When you say "at any time," Counsel—he testified as to telephone conversations.

A. (Continuing): Except after the twenty-car deal was consummated. And then I had to get shipping instructions. Mr. Powers washed himself out of the deal so then I talked to Mr. Rothstein. [86]

* * *

Q. (By Mr. Rheinhardt): Now, Mr. Feak, I think yesterday you testified that you advanced two thousand dollars to Hagerman so that [89] he could install an edger in a mill?

A. No; I bought one and sold it to him.

Q. You bought one and sold it to him?

A. He hasn't paid for it; he hasn't paid for it yet.

Q. I see. A. But I paid for it.

Q. Yes. What size cutting edge did that edger have?

The Court: I don't think you need to devote much time to that. That isn't an item of claimed damages, is it?

Mr. Thompson: No, we didn't base any claim for damages on that. That was part of the oral picture that the witness testified to. We make no claim to that.

Mr. Reinhardt: I think it has some significance, your Honor.

The Court: Not sufficient—we have too many matters here that are direct without getting too far afield.

(Testimony of John W. Feak.)

Mr. Reinhardt: Thank you.

Q. (By Mr. Reinhardt): Mr. Feak, when did you start dealing with the mills we mentioned before that supplied the lumber that you shipped to Rothstein?

A. I started dealing with the James mill in April, 1946. With Harrington about one month later. With Brink several months later. [90]

Q. Well, can you be more explicit than that?

A. No; I can't.

The Court: Oh, I think that is sufficient. The point you wanted to show is whether he was dealing with these mills before?

Mr. Reinhardt: Yes.

Q. (By Mr. Reinhardt): You were dealing with all these mills before you got this order in October? A. Yes; that is true.

Q. You said you had advanced money to all these mills?

A. I kept them owing me lumber all the time.

Q. And that was from the very beginning of your dealings? A. Yes.

Q. Now, did that continue throughout the entire period of your dealings with them?

A. In a general way; yes.

Q. In general, you always prepaid them for lumber?

A. That was how I was able to buy it, and the others couldn't because we all paid the same price.

Q. I didn't get that.

(Testimony of John W. Feak.)

A. Nobody was allowed to pay more than a certain price and I paid cash. Everybody wanted to get lumber. [91]

Q. Now, did you take their entire output?

A. No.

Q. Did you take any lumber from them except the lumber that they cut from your stumpage?

A. Yes.

Q. A substantial amount?

A. According to my definition of substantial.

Q. In relation to the amount that they cut from your stumpage, was it more or less?

A. Well, you would have to name the mills.

Q. Well, all right.

A. It varied.

Q. Now—well, you said Mr.—who was the fellow that you sold the edger to?

A. Mr. Hagerman and James.

Q. Hagerman is still indebted to you, isn't he?

A. Yes.

Q. Are these others indebted to you?

A. Mr. James owes me a balance but there is a man paying it out so much a thousand on the mill cut. That is taken care of. I made a settlement with him. I would say Mr. James doesn't owe me any money.

Q. But all the others do?

A. Hagerman does; yes.

Q. Do any of the others? [92]

(Testimony of John W. Feak.)

A. Neimi owes me a small balance, I believe. Who else furnished? Harrington?

Q. Yes?

A. Yes; Harrington owes me money.

Q. Cordell? A. Yes.

Q. Brink? A. Yes.

Q. Is that all except——

A. Practically all those mills owe me money because we all ran out of money when Rothstein didn't——

Q. We are not interested in the reason why.

Mr. Thompson: I submit that the witness should be allowed to answer.

The Court: He has gone on enough. I can't quite see the relevancy of the interrogation on this particular line. It might have some bearing on the damages, if any, to be coming to this witness but it isn't getting directly to the matter of what loss he sustained, or claims he sustained.

Q. (By Mr. Reinhardt): Now, if it is true, as you say, Mr. Feak, that these mills were always indebted to you for lumber during this period, you didn't actually go out and buy lumber expressly for Rothstein? [93]

A. In the instances where I shipped it for him I would say I did.

Q. You would say you did, but the fact is that whether you had had this order from Rothstein or

(Testimony of John W. Feak.)

not, you would have been receiving lumber from these mills?

A. I would have tried to find other buyers; yes.

Q. That is right; but you were in the position where the mills were obligated to deliver lumber to you?

A. Not necessarily. In some cases. Only when I paid them the full price.

Q. Yes. But, in any case, I think you testified that you had advanced money to these mills as prepayment for lumber; is that right?

A. That is the way I advanced it.

Q. All right; and that you had done that long prior to October, 1946?

A. That is true; but they were——

Q. So that—so that, whether you had gotten this order from Rothstein in October, 1946, or not, you would have been getting lumber from the mill—yes or no, Mr. Feak?

A. I don't know.

Q. But in any case, you had paid them for lumber?

A. I had advanced them money, which would be redeemable in lumber or the return of my money.

Q. And further, some at least, of the lumber that these mills were delivering to you came from logs that were cut from your timber stand; isn't that right?

(Testimony of John W. Feak.)

A. It came from logs which I sold—standing timber which I sold—to these fellows' mills.

Q. It was your timber?

A. It was before I sold it to the mills.

Q. Originally?

A. At the time it was cut it was not my timber.

Q. I am not getting into legal niceties but, the mill paid you for the logs they took out of your stand of timber?

A. That is right.

Q. And those are the logs that these mills cut and then they delivered the lumber to you?

A. Yes.

Q. And they would have done that whether you got this order from Rothstein or not?

A. Very likely they would have. There is no certainty, however, that they would have.

Q. Were they still cutting your timber in March, 1947?

A. What time in March?

Q. Anytime in March?

A. Yes; they were all cutting, as I remember, at that [95] time except—with the possible exception of—Neimi.

Q. They were all cutting your timber at that time?

A. No. Mr. Harrington was not cutting my timber.

Q. Was he delivering lumber to you in March, 1947?

(Testimony of John W. Feak.)

A. Yes.

Q. What about the other lumber that was being delivered to you in March, 1947?

A. Mr. James——

Q. Well, was some of it from your stumpage?

A. Some of it was; yes.

Q. Now, I don't recall definitely, Mr. Feak, but did you testify that the stumpage you received from these mills was below the price that you could have received from other mills?

The Court: You mean the lumber, not the stumpage.

Mr. Reinhardt: No. The stumpage, when they bought his stumpage.

The Court: The stumpage he sold?

Mr. Reinhardt: That is right. He owned the timber.

The Court: He says he sold the stumpage to the mills that were cutting.

Mr. Reinhardt: Let's get it clear.

The Court: Is that the statement you made?

The Witness: Yes; your Honor.

The Court: Yes; that is very clear. You would be confusing when you confuse stumpage with lumber.

Mr. Reinhardt: I would like to get this clear in my own mind, if I may.

The Court: We will have to move along because the Court can't take an indefinite time on cross-ex-

(Testimony of John W. Feak.)

amination. We have been at it for some time. Do you desire to ask him again? It is very clear in the mind of the Court, and, I think, in the minds of the Jury what he testified to. Whether it is a fact or not is for the Jury to determine, but if you want to ask him again whether he retained the stumpage——

Mr. Reinhardt: Well, in order, your Honor, to determine whether what he says is true, I would like to have him state something on which I can question him.

The Court: Well, propound your question, Mr. Reinhardt, so that we can get along.

Mr. Reinhardt: Yes.

Q. (By Mr. Reinhardt): As I understand it, Mr. Feak, you owned a stand of timber called the Sergeant tract; is that right?

A. I bought it and owned it originally.

Q. Yes. Now, am I correct in understanding that these mills, that you say cut your timber, or cut logs from [97] your timber, paid you for the privilege of going into the woods that you owned and cutting those trees into logs and taking them into your mill to cut?

A. They bought the timber—the standing trees—and paid me as they cut it seven dollars (\$7.00) a thousand.

Q. That is what I am trying to get at. So that, when they took these logs they paid you seven dollars a thousand for the logs; is that right? A. Yes.

Q. And the logs they paid you seven dollars a

(Testimony of John W. Feak.)

thousand for they cut into boards and they delivered you the boards?

A. That is true. They sold them back to me.

Q. That is what I understood and wanted to get clear in my own mind. Now, did you or did you not testify yesterday that the money that these mills paid you for those logs—that is the seven dollar figure—was less than what you could have gotten from somebody else?

A. I testified—I so testified.

Q. You did? Was that true in March, 1947?

A. I think so.

Q. Now, if that was true in March, 1947, and if it was true that Mr. Rothstein refused to take any more of your lumber in March, 1947, then you would have profited by that to the extent that you could have sold your logs for more [98] than you were getting from these mills. Isn't that right?

A. No; that isn't.

Mr. Thompson: I will object to that as argumentative.

The Court: I will have to sustain the objection as argumentative. [99]

* * *

Q. Now, Mr. Feak, yesterday—this morning—a stipulation was presented here purporting to show your sales of this lumber that you had planned to send to Rothstein. Is that essentially what this is?

A. Yes.

(Testimony of John W. Feak.)

Q. The dates on here are from June 9th to August 27th; is that right?

A. I don't know. If you show it to me I will tell you.

(Document handed to witness.)

A. (Continuing): The dates given here——

Q. Well, just answer my question. A. Yes.

Q. Yes; they do. Does that mean that you sold this lumber between those two dates?

A. Yes, I sold it. I hauled it to the remilling plant and finally sold it to the remilling plant. Some of it had lain there for months, of course.

Q. Is it your statement that you were unable to sell any of this lumber before June 9th? Just yes or no, Mr. Feak?

A. Yes; at the price I finally received. [103]

Q. In other words, at any time prior to June 9th it would have been impossible for you to sell this lumber for \$32.50 a thousand, or more?

A. I got forty dollars for it.

Q. Yes or no, Mr. Feak?

A. On part of it, yes, on part of it, no.

Q. All right. Now, I take it then that you refer to the fact that part of this was sold at \$32.50 and part at \$40.00? A. Yes.

Q. Now, as to the part sold at \$32.50, is it your statement that you could not have sold that for

(Testimony of John W. Feak.)

\$32.50 or more prior to—what was the date of that sale?

A. That sale was—I don't have the dates of the sale here. My bookkeeper is here. He could give it to you. You can ask him.

Q. Well, but it wasn't before June 9th?

A. No; it wasn't.

Q. Was it before July 9th?

The Court: He says he doesn't know, Mr. Reinhardt, and we will just put in a lot of time.

Mr. Reinhardt: All right.

Q. (By Mr. Reinhardt): Now, Mr. Feak, going back, you testified that you had seven cars of this lumber ready around March 19th, [104] or 20th? Isn't that right? The two cars of four-inch and the five cars of one- and two-inch? A. March 9th?

Q. 19th? A. No; I didn't say that.

Q. Well, when were those ready?

A. Sometime after the third car was refused, which was later than March 20th.

Q. After the third car was refused.

A. Yes.

Q. Well, then, is it true that when the third car was refused you did not have the five cars of one-inch ready for loading?

A. No, at the time the third car was refused, and I new there was no hope of getting Mr. Rothstein to take it, there was that much lumber accumulating and further shipments to the side track were stopped

(Testimony of John W. Feak.)

simultaneously with the knowledge that Mr. Rothstein would not take the third car.

Q. Now, I go back to the early part of our session this morning and ask you if you did not then say, and also yesterday, that Rothstein refused the one- and two-inch lumber that you told him was ready and piled up on the siding when you asked him for shipping instructions on the third car of four-inch lumber? A. That is right. [105]

Q. Well, was it there or not at that time?

A. It was there, but as I say it kept moving in.

Q. It was there on March 9th when you asked for shipping instructions? A. No, it was not.

Q. When did you——

A. I shipped my first car on the 19th.

Q. And when did you ship the third car?

A. Late March or early April, because there was a car shortage.

Q. And you testified yesterday it was late in March, not later than March 30th.

A. I will let that answer stand. If you want definite records, I will get them for you.

Q. This is satisfactory for me. So that the last seven cars of lumber were available by March 30th, weren't they? A. Nine cars.

Q. Nine cars? A. At least nine cars.

Q. And the rest of them came in pretty fast after that because, I think, you testified by that time all the mills were set up and rolling; isn't that right?

A. No; I didn't testify to that and that wasn't exactly the fact. [106]

(Testimony of John W. Feak.)

Q. That wasn't exactly the fact, but it was contemplated in any case in your arrangements regarding this twenty-car deal that all the twenty cars would be delivered within thirty days, if possible?

A. Yes.

Q. And that was one of the reasons why this business about the four-inch was added, isn't that right, so that you could deliver within approximately thirty days? A. Yes.

Q. And that thirty days started running March 11th?

Mr. Thompson: I think I will object to that on the grounds that it violates the oral evidence rule because the written letters definitely set forth that date.

The Court: Objection overruled.

Q. (By Mr. Reinhardt): So that, if you were——

The Court: Avoid, as much as you can, what would be in the nature of argument.

Mr. Reinhardt: Yes.

Q. (By Mr. Reinhardt): If you were to have complied with this arrangement substantially all the lumber would have been available by April 11th, approximately? A. Substantially; yes.

Q. Now, these Crow's Reporters have been introduced. [107] Now, you have those Reporters for the period March 20th, I believe, to May 29th; is that right? A. Yes.

Q. Now, in those pamphlets is there any place

(Testimony of John W. Feak.)

where the going market price for this kind of lumber is indicated?

Mr. Thompson: I object to that on the grounds that the pamphlets are the best evidence of what they contain.

The Court: He may answer, but you can get to the thing much easier if you had checked it out for him and wanted to show that the price was a certain amount rather than have the time consumed. You have something in mind there, don't you, Mr. Reinhardt, about the price of lumber which is in there? I don't want to go into detail because those documents go to the Jury.

Q. (By Mr. Reinhardt): Now, for the March 20th pamphlet, it shows the price range is forty dollars to fifty dollars, with most sales at forty-two dollars. April 3rd, thirty-eight to fifty-five dollars; most sales at forty-two dollars to forty-five dollars. May 1st, thirty-five dollars to forty-five dollars. May 15th, thirty-five dollars to \$47.50. And, May 29th, thirty dollars to forty-two dollars.

A. That last clause there explains that.

Q. Well, I won't mention that. [108]

A. All right.

Q. Those figures indicate the market during those respective periods, do they not, Mr. Feak?

A. They indicate a falling market; yes.

Q. Whether it was rising or falling, those were the prices at which transactions occurred during that time, weren't they? A. I assume so.

(Testimony of John W. Feak.)

Q. (By Mr. Reinhardt): Mr. Feak, just to make it sure as I understand it, you claim that you had one hundred thousand feet of this lumber ready for loading — whenever it was—when you learned that, you say, Mr. Rothstein told you he wouldn't take any one and two inch; is that right?

A. Yes.

Q. Now, this stock was stacked at Rochester at your siding at Rochester?

A. Most of it was stacked there but it was all there by the time I knew he wouldn't take any more.

Q. That is right. Now, you have an item in your computation of alleged loss of loss in the cost of hauling for 425 thousand feet. If you had stopped hauling lumber to that siding when you had this one hundred thousand feet there, that item would be four hundred instead of seventeen hundred; isn't that right? A. No; it is not.

Q. Why not?

A. On all the lumber piled up at the siding [110] the freight was all paid. I had to pay seven dollars a thousand to get that hauled to Olympia and Tacoma. Then I had to pay four dollars a thousand to get it hauled to the mill site.

Q. I am talking about this item of \$1701, which is based on four dollars a thousand for hauling 425 thousand feet. I say, if, instead of hauling that other 325 thousand feet, after you claim you knew that the balance would not be taken, you would

(Testimony of John W. Feak.)

have saved that four dollars, that particular four dollars?

A. I would have saved the four dollars not only on that but on the rest of the lumber that I ordered to fill Rothstein's order.

Q. And if you had stopped these mills from cutting, if they were cutting especially for this order, at that time, you wouldn't have wound up with, as you claim, 425 thousand feet?

A. I would have wound up with more because I had the order placed and I had to take the lumber.

Q. Well, now, so far as that part is concerned, we have been over that this morning. Your arrangements with these mills was such that you were taking lumber from them all the time.

A. No. Only when I had orders. This was a special order and had to be especially cut and I distributed more [111] than thirty cars.

Q. You have answered my question.

Mr. Thompson: I think he should be allowed to answer.

Q. (By Mr. Reinhardt): You were in a position though to tell these mills to stop cutting at any time, were you not?

A. No, I wasn't. Certainly not. I wish I had been.

Q. You were in a position to tell them what to cut.

A. I had already told them what to cut. I gave them firm orders and they held me to it.

(Testimony of John W. Feak.)

Q. They held you to it?

A. They didn't have to; I performed to the agreement.

Q. But you didn't have to.

A. Yes, I had to. Certainly I had to. I had agreed to it.

Q. Now, according to this tabulation of yours, your first sale was at a price around thirty-three dollars a thousand. That is this sale of June 9th?

A. Yes; that is true.

Q. That was a very low price by comparison with the price that had prevailed?

A. That was the best price that I could get.

Mr. Reinhardt: If the witness can be instructed to [112] answer the question.

A. (Continuing): And it was not——

Q. (By Mr. Reinhardt): The fact is, on June 20th, the sale you made was at forty dollars a thousand?

A. The price I received I set forth there.

Q. Yes. And a majority of these other sales were at forty dollars a thousand or in that neighborhood; is that right?

A. I believe so. Except for those taken by Bucoda which had been hauled over there.

Mr. Reinhardt: No further questions, your Honor.

(Testimony of John W. Feak.)

Redirect Examination

By Mr. Thompson:

Q. About this \$1710, or \$1701, item, Mr. Feak, state what transportation that covered.

A. That covered the extra transportation.

Q. Yes?

A. To Olympia and Bucoda to where I had to take it. You couldn't leave it in the mill yard. I had to take it some place, so I took it to the remilling plants where I could sell when there was a demand again, or if I could find some buyer who would buy it in the remilled condition. I took it to the remilling plant instead of the side track.

Q. That \$1701, did any of that reflect transportation [113] from the mills to Rochester after you were informed that no further shipments would be taken? A. No.

Q. On or about March 8th at the time you made this second agreement, state whether or not any of these supply mills were in operation and, if so, which ones.

A. None were in operation for me. Mr. James' mill was cutting railroad orders. The only orders he could get.

Q. What about the rest of them?

A. They were all shut down for lack of buyers.

Q. Had you placed any orders with them previous to that time for any lumber whatsoever?

A. No; not on this order.

Q. And——

(Testimony of John W. Feak.)

A. I didn't have this order until March 8th.

Q. After you got the order from Mr. Rothstein, you placed the order for the supply mills?

A. I went around to Mr. Rothstein. These fellows agreed to start up if I could get the orders. When I got the orders I went around and gave the orders. I divided among the orders for thirty cars and not twenty cars because Mr. Rothstein wanted more.

Q. Did you have any other customers for that type of lumber at that time? [114]

A. I did not. This was a special order.

Mr. Thompson: That is all.

Recross-Examination

By Mr. Reinhardt:

Q. Did I understand you to say that all these mills were shut down in March, 1947?

A. My recollection is that they were.

Mr. Thompson: He said with the exception of James.

A. (Continuing): The little mill market had collapsed.

Q. (By Mr. Reinhardt): I beg your pardon?

A. The little mill market had collapsed.

Q. All right. But it is your testimony that all these mills, except James——

A. My recollection is that that is the fact.

Mr. Reinhardt: That is all.

Mr. Thompson: That is all, Mr. Feak.

(Whereupon, the witness was excused.) [115]

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court, hereby certify that the foregoing is a true and correct transcript of matters therein set forth.

/s/ EARL V. HALVORSON. [116]

FRANK D. BARR

called as a witness for and on behalf of the Defendant, upon being first duly sworn, testified as follows:

Direct Examination

By Mr. Thompson:

Q. State your name. A. Frank D. Barr.

Q. What is your business?

A. Manager of the Bucoda Planing Mill.

Q. And how long have you had that position?

A. Since October, 1946.

Q. Previous to that what had been your business?
A. Buying lumber.

Q. For how many years? A. Since 1939.

* * *

Q. Were you familiar with the market price of this rough lumber, one, two, three and four inch widths in June, 1947?

A. To a certain extent, yes.

Q. You had some offers made on that, did you?

A. Yes, sir.

Q. What would you say was the market price of one and better and two and better at that time

(Testimony of Frank D. Barr.)

in that area, the area of Rochester, and at your plant?

A. It was pretty low. It started declining in the middle of the summer.

Q. May I present this document to refresh your recollection. You can't testify from it, of course. Can you now testify after refreshing your recollection?

A. Well, according to this we were paying twenty-eight dollars for one and twenty-three for two. [6*]

Q. Now——

Mr. Reinhardt: I object to that.

Mr. Thompson: That is probably correct.

The Witness: Excuse me.

Q. (By Mr. Thompson): Do you have any independent recollection?

A. Well, we buy from a good many mills. Some have longer lengths than others and you pay more money. I would say that the average price in that particular period would range from twenty-five dollars (\$25.00) to thirty-five dollars (\$35.00), depending on the lumber.

Mr. Reinhardt: What period is that?

Mr. Thompson: I put it May and June, 1947.

A. (Continuing): I am talking about rough cants.

Q. (By Mr. Thompson): Yes.

A. As we buy them.

(Testimony of Frank D. Barr.)

Q. That is right. Random widths and thicknesses? A. Yes, sir. [7]

* * *

Cross-Examination

By Mr. Reinhardt:

* * *

Q. Does it ever occur—strike that. Now, you testified to the price of rough cants during—when was it—what was the period you covered?

Mr. Thompson: May and June.

A. Yes, sir.

Q. (By Mr. Reinhardt): What was the market price at that time for rough [12] boards?

Mr. Thompson: I object to that as immaterial. Oh, I guess you can test the credibility of the witness.

Mr. Reinhardt: This is not for the purpose of testing the credibility of the witness, your Honor. It is based on the premise that what was involved here was rough boards and rough woods lumber.

Mr. Thompson: It is not proper cross-examination then. It wasn't gone into in chief.

The Court: Objection overruled.

A. Rough boards, if brought in ready for this planer, would be cut at less than five dollars in the cants.

Q. What about rough dimension lumber?

A. The same, if it was ready for the planer.

Q. Now, what would you say as to the going

(Testimony of Frank D. Barr.)

value of rough boards in June—in May and June—of 1947? Can you give us a price or a price range?

A. Well, I would just add five dollars to what I gave you before.

A. Well, I would ask you to give us a price.

A. I would say it would range between thirty and forty dollars.

Q. And rough dimension? A. The same.

Q. When did you have occasion last to check those [13] prices? A. In 1947?

Q. Yes. A. Just now, a moment ago.

Q. When you say a moment ago, what check did you make a moment ago?

A. Well, the memoranda that he showed me.

Q. I see. But do you have any independent recollection on that?

A. Well, I have a general recollection. I know the price slumped in the middle of the summer and we quit buying.

Q. Now, if I told you that Crows' Price Reporter showed a price for the week ending May 15th for rough boards of number two and better of between forty-five and fifty-five dollars, and for number three and better between forty dollars and fifty dollars, would that affect your testimony?

A. Not necessarily; no.

Q. Well, now, what do you mean by that?

A. Well, Crow gets most of his data from mills such as our own. We establish the price and he

(Testimony of Frank D. Barr.)

prints it a week or two later.

Q. Then these figures came from your mill or some mill like yours? [14]

A. Certainly. He gathers his information from the industry.

Q. That is right. So that, if this shows that the price he got in that way was forty-five to fifty dollars for rough boards number two and better, and forty to fifty dollars rough boards number three and better, then your recollection is probably in error, isn't that right?

A. No; I wouldn't say so. He is covering the whole West Coast. I am talking about Bucoda, this particular area.

Q. The fact is though that this price is based on information that he obtained from you and from other mills like yours? A. That is right.

Q. And you are not suggesting that it is not published correctly in here?

A. No; I wouldn't say that.

Q. Now, if I told you that Crow's Reporter showed a price range during the week ending June 12th for number one rough green of thirty-seven dollars and fifty cents to forty-five dollars, with most sales at forty to forty-three dollars, would you say that was not accurate?

A. What size lumber was that?

The Court: Let's not spend too much time on this. Go ahead and let him see that one. [15]

Mr. Reinhardt: I don't want to go through any more, your Honor.

(Testimony of Frank D. Barr.)

A. I would say he is correct for specified lengths. We were buying random lengths and talking about random lengths, which would be considerably less than specified lengths.

Q. Now, in your testimony, you said that—talking about this custom of reinspecting, you said that—that is generally agreed upon by the parties in advance?

A. No; it is accepted by the industry as the procedure to be followed unless some special agreement is entered into in advance.

Q. I see. Now, do you have any recollection about the prices of this kind of lumber that we have been talking about during the period of April—during the month of April?

Mr. Thompson: I object to that unless counsel specifies what kind of lumber. He talks about one kind and I talked about another.

The Court: That is almost self-evident that the witness can't remember but if you want him to, ask whether he agrees with the——

Mr. Reinhardt: Well, I assume he would agree with the figures in Crow's Reporter.

The Witness: Not necessarily. [16]

The Court: Now, if you want to ask him what a particular item would be, if he agrees with that item, whatever it is, you may do that.

Q. (By Mr. Reinhardt): But whether lumber can be disposed of to a local buyer, certainly these

(Testimony of Frank D. Barr.)

quotations indicate that it could be disposed of on the West Coast at the prices in these specified lengths? A. Yes, sir.

Q. And that is true of all the other information contained in here? A. It is close.

Mr. Reinhardt: That is all.

Redirect Examination

By Mr. Thompson:

Q. I asked you about rough green fir, random size and length. Counsel asked about mill run boards and small timbers and showed that the type of lumber he was talking about was five to ten dollars less per thousand than the type I was talking about. What is the reason for that, if you know?

A. I didn't quite get your point. In other words, you want to know why one inch and two inch woods lumber is more than cants?

Q. Why does lumber, mill run, three or better, sell [17] for more than random size and length rough and for remilling?

Mr. Reinhardt: The witness didn't so testify.

The Court: He is asking him now.

Mr. Reinhardt: Then I submit that he should not be led.

The Court: Proceed.

A. Why is number three and better, one and two inch cut, more than two and better rough green cants?

Q. (By Mr. Thompson): Counsel asked you a

(Testimony of Frank D. Barr.)

question based on Crow's Digest on the price of mill run, dimension boards. As I recall it.

A. Yes.

Q. And you said it had a price in excess, five dollars or more——

A. Of cants?

Q. Yes.

A. Yes, sir; because you have so much less labor in getting them ready for market. You don't have——

Q. Your testimony as to value was as to cants; is that right?

A. Yes, sir.

Mr. Thompson: That is all. [18]

Recross-Examination

By Mr. Reinhardt:

Q. Now, what is the difference between cants and dimension lumber, or rough boards?

A. Well, a cant is a four inch or thicker plank or timber which can be resawn to make boards to dimension.

Q. Getting under four inches is not a cant; is that right?

A. We don't call it a cant.

Q. So that one and two inch lumber would not be a cant?

A. That is correct.

Q. And just so that we can identify what we are talking about in Crow's Digest, taking Crow's Reporter for the week ending May 15th, what are the prices for rough boards and dimension lumber; that is one and two inch lumber?

Mr. Thompson: I object to that as not the best evidence. That document is in evidence.

(Testimony of Frank D. Barr.)

The Court: Objection sustained. The document is in evidence and you may read from it if you wish.

Mr. Reinhardt: No further questions.

Mr. Thompson: That is all, Mr. Barr.

(Whereupon, the witness was excused.) [19]

Certificate

I, Earl V. Halvorson, official court reporter for the within-entitled court, hereby certify that the foregoing is a true and correct transcript of matters therein set forth.

/s/ EARL V. HALVORSON. [20]

PLAINTIFF'S EXHIBIT No. 8

J. W. Feak Mercantile Co.

Olympia, Washington

June 3, 1947.

Reinhardt & Schwab,
Portland, Oregon.

Gentlemen:

In response to your letter of May 15th, please be advised that it is your client who breached our agreement of March 4th, and not myself. In accordance with that agreement I made expensive preparations to ship the lumber as agreed and loaded three carloads the first two of which he received as agreed. and loaded three carloads the first two of which he

received as agreed. His refusal to accept the third car and subsequent cars violated the terms of our understanding and caused us substantial loss, as it became necessary to re-handle at great expense the many cars which were hauled and piled at the sidetrack for loading. Not only this, but I was put to additional expense in cutting this lumber to his specifications.

The premise upon which your client refused the 3rd car was that it was 4" thick. Your order to me included 4" lumber. Endeavoring to comply with his changing mind I began the manufacture of 1" and 2" lumber, and when a number of carloads were at the sidetrack ready for loading, I called Mr. Powers and asked him to check with Mr. Rothstein to be sure he hadn't changed his mind again. Mr. Powers stated Mr. Rothstein wouldn't take the 1" and 2" lumber either.

There is no point in reviewing the merits of your client's former claim since it was resolved by our agreement of March 4th, but since you make various statements concerning it, I will present to you the facts to keep the record straight.

The lumber shipped you conformed to invoice descriptions and the prices charged were not above ceiling prices. The only O. P. A. violation which could have occurred in the entire matter was in the nature of your client's offer to purchase from me. It was not until price decline of the lumber market that your client's conscience began to give him trouble. This assurance that there was not

violation of O.P.A. regulations with respect to the lumber I shipped him should relieve him of the apprehension that he was involved in breaking the law.

I have stood and still stand ready to fill his order of March 4th, despite the vacillating and changing moods of your client.

Your client forfeited any rightful claim against me whatsoever when he breached our agreement of March 4th, and the only balance between us is reimbursement to me for the loss and damage he caused me by reason of that breach of agreement.

Yours very truly,

J. W. FEAKE MERCANTILE
CO.,

By /s/ JOHN W. FEAKE.

JWF/M

[Admitted]: Oct. 19, 1949.

DEFENDANT'S EXHIBIT A-3

Exhibit A

March 4, 1947.

James Arthur Powers, Esq.,
Corbett Building,
Portland, Oregon.

Dear Jim:

This will confirm our conversation of this morning from which I understand that Mr. Feak has agreed to deliver to Mr. Rothstein for Prudential Lumber

Corporation in not less than thirty days from today twenty (20) cars of fir or pine lumber mill run of the same type as heretofore delivered to Prudential Lumber Corporation, random length and width but uniform thickness in either 1" or 2" thicknesses, cars to be loaded uniformly so that all the lumber in each car will be of the same thickness. The lumber is to be unfinished and is to be billed to Prudential at the rate of \$44.00 per thousand, on cars.

Mr. Rothstein advises me that he desires these cars delivered to the Carlson Planing Mill at Vancouver, Washington.

I am glad it was possible to dispose of this matter in this way.

Thanking you for your cooperation, I am,

Sincerely,

REINHARDT & SCHWAB,

By

Justin N. Reinhardt.

cc: J. W. Feak,
c/o J. W. Feak Mercantile Co.,
Roy, Washington.

Prudential Lumber Corp.
c/o Portland Columbia Lbr. Co.,
Cascade Bldg.,
Portland, Oreg.

JNR:p

Exhibit C

March 8, 1947.

Mr. James Arthur Powers,
Attorney at Law,
Corbett Building,
Portland, Oregon.

Dear Jim:

I discussed your letter of March 7th with Mr. Rothstein, and he advises me that he will be willing to accept 1 inch, 2 inch, 3 inch, or 4 inch lumber, so long as each car consists entirely of one thickness only.

All cars of 1 inch or 2 inch lumber are to be shipped to the Carlson Mill in Vancouver, Washington, as stated in my letter of March 4th. Shipping instructions for 3 inch and 4 inch cars will be furnished by Mr. Rothstein as the cars become ready for delivery.

With this letter it seems to me the parties have reached a final agreement. I hope you concur.

Thanks for your cooperation.

Sincerely,

REINHARDT & SCHWAB,

By JUSTIN N. REINHARDT.

cc Mr. J. W. Feak
E. Milton Rothstein

JNR/MM

Exhibit B

March 7, 1947.

Mr. Justin N. Reinhardt,
Attorney at Law,
Corbett Building,
Portland 4, Oregon.

Dear Justin:

I returned to the office from a siege of intestinal flu, and find your letter of March 4th concerning the Feak-Prudential matter. We agree in principle, namely, that Mr. Feak has stated that he would furnish 20 cars of rough lumber loaded on the cars, at \$44.00 per thousand, to the Prudential, and that the cars will be loaded in uniform thickness, random length and random width.

However, as to the 30 day period in which these cars must be furnished, Mr. Feak did not state to me that he could make delivery within the time specified by you, and therefore I think, as to the time in which these cars are to be delivered, the matter should be worked out directly between Mr. Feak and Mr. Rothstein. I am very much concerned about the time limit, because Mr. Feak, in my conversation with him a few evenings ago (I have not had a chance to talk to him since), stated to me that he would load and deliver to the Prudential the 1" and 2" as fast as he gets it from the mills. However, he pointed out that deliveries would not be as fast this way as they would be if the cars were loaded with mixed sizes. This is one of the

details I was concerned with when it was mentioned that the details could be worked out between us.

In this matter I have occupied more or less the position of arbitrator, and it was at my urging that Mr. Feak said he would deliver the 20 cars. Now I am beginning to feel very much like the individual who stepped into a domestic argument, trying to harmonize the differences in a matrimonial dispute, only to end up by getting socked from both directions. It is for this reason that I am suggesting that Mr. Rothstein and Mr. Feak work out the details of this matter directly. I know very little about the lumber business, but I do know in my limited experience that it is not an easy thing to get cars for a new operation. Mr. Feak will have to make arrangements to get box cars at the siding at Rochester, Washington. Now he may or may not be able to get those cars upon fairly short notice. It is my understanding that there is a car shortage, and I think Mr. Feak probably had this factor in mind also when he stated to me that he would make delivery of the cars to Prudential as rapidly as possible, but he certainly did not state to me that he would undertake to deliver them within 30 days.

Before stepping out of this situation, which I shall do with this letter, I want to pass on to your client a suggestion made by Mr. Feak in my last conversation with him, which was to the effect that the deliveries could be speeded up a good bit if unmixed cars of wider lumber, as well as 1" and 2", could be loaded; that is to say, as I understand it, a car of all 3", or a car of all 4", random widths and lengths.

The reason for this, I believe, is that Mr. Feak takes from the mills the mill run as it is cut. The capacity of the mills probably would be great enough to cut 20 cars in a period of 30 days of mill run, but the 1" and 2" would only be a portion thereof, and I am not at all sure that it would be physically possible for Mr. Feak to load out 20 cars within a period of 30 days. In any event he must speak for himself on this subject. I do recall that in his conversation with me he stated that any arrangement that was made he wanted to live up to one hundred per cent, as it was his desire to operate on a basis of full confidence with Mr. Rothstein, and that he did not want to enter into an agreement which he might not be able to fulfill. It is that remark, and similar ones, that makes me overly anxious here to make it clear that Mr. Feak did not tell me that he could deliver the cars specified within a period of 30 days. The parties are so close to an agreement here that I dislike to see it fall through by reason of some physical impossibility, and I think that by dealing directly, Mr. Rothstein and Mr. Feak could have an understanding on a satisfactory basis; in short, a meeting of the minds. Mr. Feak can usually be reached at Olympia 6549.

Yours very truly,

JIM.

James Arthur Powers.

JP:Be

cc to Mr. J. W. Feak

EXHIBIT D

March 11, 1947.

Mr. James Arthur Powers,
Corbett Bldg.,
Portland, Oregon.

Dear Jim:

I hereby confirm Mr. Rothstein's order for 20 cars of rough lumber at \$44.00 per thousand f.o.b. cars. Payment to be made through the U. S. National Bank of Portland, Portland, Oregon, upon presentation of invoices and bills of lading.

Lumber to be loaded one thickness only per car shipment in 1", 2", 3" and 4" unspecified widths and lengths. Invoices will show in detail various sizes in each shipment. One and two inch lumber to be shipped to Carlson Mill, Vancouver, Washington, for account of Rothstein and 3" and 4" lumber to be shipped as directed by Rothstein when notified.

Please handle this matter for me the rest of the way if anything remains to be done except deliver the lumber and that I will do.

Cars will be ordered at once and loading will commence at an early date.

Very truly yours,

/s/ J. W. FEAK.

[Admitted]: Oct. 18, 1949.

UNNUMBERED TABULATIONS USED DURING TRIAL OF CAUSE

Olympia Harbor Lbr. Co.
Sales To:—

1947	Footage	Received Payment	Loss Incurred by Diversion
June 9.....	232,078	\$ 7,677.59	
June 20.....	13,849	553.96 Less 2%	
June 20.....	5,935	237.40 Less 2%	
June 30.....	3,136	125.44 Less 2%	
June 30.....	24,361	964.10 Less 2%	
July 9.....	4,256	170.24 Less 2%	
July 9.....	384	14.81 Less 2%	
July 9.....	10,752	416.92 Less 2%	
July 21.....	17,771	710.84 Less 2%	
Aug. 27.....	4,629	21.76 Less 2%	\$11,476.20
Aug. 5.....	13,920	542.88 Less 2%	7,677.59
Aug. 5.....	1,184	40.26 Less 2%	\$ 3,798.61 Less 2% = \$ 75.97
July 31.....	10,341	413.64 Less 2%	
Aug. 5.....	15,104	583.14 Less 2%	
Aug. 5.....	3,210	73.17 Less 2%	1,069.95 Less 2% = 21.40
Totals	360,910	\$12,546.15	

360,910' @ \$44.00 per M. would have brought \$15,880.04

Actually brought 12,546.15 \$3,333.89

Loss in cost of hauling 425,251' @ \$4.00 per M. 1,701.00

Bucoda Lumber:—

64,341 @ \$44.00 per M\$2,831.00

Actually brought \$32.50 per M. 2,091.08 739.92

Loss incurred\$5,872.18

COMPUTATION OF DAMAGES CLAIMED BY PLAINTIFF

The total OPA ceiling prices billed by Feak amount to \$29,024.00. This figure it is claimed by plaintiff should have been \$26,095.63, based upon the following computation.

Lumber Received			
Grade	Quantity	OPA Ceiling Price	Total Price
Select	39,590	\$45.50	\$1,801.34
No. 1	210,538	40.00	8,421.52
No. 2	155,303	38.50	5,979.16
No. 3	172,478	32.50	5,605.53
No. 4	35,085	20.50	719.24
Hemlock	101,967	35.00	3,568.84
			\$26,095.63

This results in a basic claimed overcharge of\$2,928.37
to which should be added the following claims:

\$1 per thousand for the difference between the ceiling
price of rough lumber and finished lumber based on
total shipment of 723,000 ft. 723.00

Freight differential on hemlock at \$3.50 a thousand
on 101,967 ft. 355.00

Price differential between hemlock and fir \$2 a thousand 203.60

Shortage 8,000 feet at \$60 a thousand 480.00

Overcharge in the 5% item resulting from the over-
charge on ceiling prices, 5% of \$2,928.37 146.42

Total of overcharges and incidental losses
claimed by plaintiff\$4,836.39

Car	Billed	Actual	Surplus	Shortage
1.....	25,382	25,159		223
2.....	26,939	26,601		338
3.....	31,204	29,626		1,578
4.....	30,269	30,426	157	
5.....	25,442	25,321		121
6.....	40,406	40,225		181
7.....	30,310	30,348	38	
8.....	28,867	26,869		1,998
9.....	24,713	24,651		62
10.....	24,525	24,320		205
11.....	24,606	24,517		89
12.....	33,128	33,689	561	
13.....	27,488	27,518	30	
14.....	23,303	23,884	581	
15.....	24,933	24,700		233
16.....	23,911	25,343	1,432	
17.....	30,407	30,576	169	
18.....	32,408	31,773		635
19.....	25,780	20,841		4,939
20.....	31,467	31,397		70
21.....	32,593	32,999	406	
22.....	23,084	23,157	73	
23.....	31,337	28,808		2,529
24.....	26,739	26,739	.....	.....
25.....	23,780	25,420	1,640	
26.....	20,529	20,376		153
	723,550	715,283	5,087	13,354
Total Billed	723,550	Total Shortage	13,354	
Total Shipped	715,283	Total Surplus	5,087	
Difference.....	8,267	Difference.....	8,267	

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO
RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11 as amended, of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) of the Federal Rules of Civil Procedure, as amended, I am transmitting herewith as the Record on Appeal in the above-entitled cause, pursuant to Plaintiff-Appellant's Designation of the Contents of the Record on Appeal, filed herein, such original pleadings on file and of record in said cause in my office at Tacoma, Washington, as requested by the aforesaid Designation, as set forth below:

1. Complaint (1).
2. Amended Complaint (5).
3. Answer to Amended Complaint of Plaintiff and Cross-Complaint of Defendant (6).
4. Answer to Cross-Complaint (10).
5. Pre-trial Order (with exhibits attached) (17).
6. Verdict (21).
7. Judgment (26).
8. Plaintiff's Motion for New Trial (22).
9. Transcript of Court's Oral Opinion (31).

10. Order Overruling Motion for New Trial (32).

11. Order Approving Supersedeas and Cost Bond (33).

12. Supersedeas and Cost Bond on Appeal (34).

13. Statement of Points to Be Relied Upon (36).

14. Petition for Extension of Time for Docketing Record on Appeal (37).

15. Order Extending Time to Docket Appeal Record (38).

16. Stipulation for Transmittal of Portions of Original Record and Original Exhibits (39).

17. Order for Transmittal of Portions of Original Record and Original Exhibits to Court of Appeals (40).

18. Plaintiff-Appellant's Designation of Record on Appeal (41).

19. Reporter's Transcript of Testimony of John W. Feak and Frank D. Barr (42).

I do further certify that as part of the Record on Appeal I am transmitting herewith, pursuant to Order of Court, the following original exhibits, offered in evidence in the trial of the above-entitled cause, to wit: Plaintiff's Exhibits numbered 1 to 10, inclusive, and Defendant's Exhibits numbered A-1 to A-7, inclusive, and that the aforesaid original

pleadings and papers and exhibits constitute the Record on Appeal from the Judgment of the said District Court, filed and entered on the civil docket of said cause on October 31, 1949.

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 10th day of April, 1950.

MILLARD P. THOMAS,
Clerk.

[Seal] By /s/ E. E. REDMAYNE,
Deputy.

[Endorsed]: No. 12521. United States Court of Appeals for the Ninth Circuit. Portland-Columbia Lumber Company, a corporation, Appellant, vs. J. W. Feak, doing business as J. W. Feak Mercantile Company, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed April 14, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12521

PORTLAND-COLUMBIA LUMBER COMPANY,
a Corporation,

Appellant,

vs.

J. W. FEAKE, dba J. W. FEAKE MERCANTILE
COMPANY,

Respondent.

PETITION AND ORDER
RE EXHIBITS

The Petition of Portland-Columbia Lumber Company, appellant, by its attorney, Justin N. Reinhardt, respectfully shows to the Court and alleges:

Appellant's designation of portion of record to be printed on appeal herein lists as item 16 thirteen issues of "Crow's Price Reporter," each of which is a printed pamphlet consisting of about ten pages. The expense of reproducing this large exhibit in the record on appeal herein would be prohibitive. Petitioner, therefore, respectfully prays the Court for an order that item 16 of appellant's Designation of Portion of Record to be Printed on Appeal

need not be reproduced but will be considered by the Court in its original form.

Respectfully submitted,

PORTLAND-COLUMBIA
LUMBER COMPANY,

By /s/ JUSTIN N. REINHARDT,
Its Attorney.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ HOMER T. BONE,

/s/ WM. E. ORR,
United States Circuit Judges.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PORTION
OF RECORD TO BE PRINTED ON AP-
PEAL

1. Pre-trial Order.
2. Verdict.
3. Judgment.
4. Plaintiff's Motion for New Trial.
5. Transcript of Court's Oral Opinion.
6. Order Overruling Motion for New Trial.
7. Order Approving Supersedeas and Cost Bond.
- 7a. Notice of Appeal.

8. Supersedeas and Cost Bond on Appeal.
9. Statement of Points to Be Relied Upon.
10. Petition for Extension of Time for Docketing Record on Appeal.
11. Order Extending Time to Docket Appeal Record.
12. Stipulation for Transmittal of Portions of Original Record and Original Exhibits.
13. Order for Transmittal of Portions of Original Record and Original Exhibits to Court of Appeals.
14. Plaintiff-Appellant's Designation of Record on Appeal.
15. Appellant's Statement of Points to Be Relied Upon, filed with this Court.
16. Crow's Price Reporter, plaintiff's Exhibit "5" and defendant's Exhibit "A-4," consisting of issues dated March 6th, March 20th, April 3rd, May 1st, May 15th, May 29th, June 12th, June 26th, July 17th, July 31st, August 14th, August 28th and September 11th, only the following portions of which ought to be printed:
 - (a) The "Note" which appears in identical form on the inside cover of said issues.
 - (b) The tabulation entitled "Rough Green Stock Produced By Small Fir Mills Not Equipped to Surface Lumber," which appears on the upper portion of Page 5 of each issue except the June 26th issue and on Pages 4 and 5 of that issue.

17. Testimony of Frank D. Barr, Page 3, lines 1 to 15; Page 6, line 10 to Page 7, line 19; Page 12, line 19 to Page 19, line 24.

18. Testimony of John W. Feak, Page 6, line 22 to Page 7, line 7; Page 11, line 2 to Page 12, line 15; Page 19, line 2 to line 13; Page 21, line 7 to line 16; Page 27, line 11 to Page 30, line 19; Page 31, line 25 to Page 44, line 11; Page 45, complete; Page 49, line 3 to Page 50, line 3; Page 74, line 2 to Page 75, line 4; Page 76, line 7 to Page 86, line 11; Page 89, line 23 to Page 99, line 6; Page 103, line 4 to Page 109, line 8; Page 110, line 6 to Page 115, line 20.

19. Plaintiff's Exhibit "8."

20. Defendant's Exhibit "A-3."

21. Unnumbered exhibit identified at Pages 44 and 45 of testimony of witness John W. Feak.

22. It is requested that in printing this record on appeal there be omitted therefrom all formal matters which it is permissible under the rules of this Court to omit, such as headings, verifications, certificates, etc.

23. Clerk's Certificate.

Respectfully submitted,

/s/ JUSTIN N. REINHARDT,
Attorney for Appellant.

Service accepted.

[Endorsed]: Filed April 29, 1950.

